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THE

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ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1738

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1798

Gold Plate (Standard) Act, 1798 (38 *Geo.* 3, *c.* 69), *ss.* 2, 6. Westwood *v.* Cann. **C.A. 887**

1846

Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 3. Grounsell *v.* Cuthell and Linley - - **Ormerod J. 673**

1854

Gold and Silver Wares Act, 1854 (17 & 18 *Vict. c.* 96), *ss.* 1, 4. Westwood *v.* Cann - - - - - **C.A. 887**

1872

Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4. Jeffery *v.* Johnson. **C.A. 8**

1879

Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 17. Regina *v.* Kent Justices. *Ex parte* Machin. **Divl.Ct. 355**

—— —— *s.* 25. Everett *v.* Ribbands **C.A. 198**

1882

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1889

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1893

Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25. Du Jardin *v.* Beadman Bros. Ld. - - - - **Sellers J. 712**

—— —— *s.* 50 (3). Trans Trust S.P.R.L. *v.* Danubian Trading Co. Ld. **C.A. 297**

1894

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1901

Factory and Workshops Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 79. Benn *v.* Kamm & Co. Ld. - - - **C.A. 127**

1906

Open Spaces Act, 1906 (6 *Edw.* 7, *c.* 25), *ss.* 10, 15. Burnell *v.* Downham Market Urban District Council. **C.A. 55**

1910

Finance (1909–10) Act, 1910 (10 *Edw.* 7, *c.* 8), *s.* 43, *Sch.* 1. Green *v.* Thames Launches Ld. **Lord Goddard C.J. 725**

Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 111. Green *v.* Thames Launches Ld. **Lord Goddard C.J. 725**

1914

Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 18 (1), 22 (4), 38 (*b*), 105 (1). Bendall *v.* McWhirter - **C.A. 466**

1916

Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1 (4). Commissioners of Customs and Excise *v.* Queen's Park Rangers Football and Athletic Club Ld. - **Lloyd-Jacob J. 918**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.* Chibbett (Inspector of Taxes) *v.* Harold Brookfield & Son Ld. - - - - - **C.A. 677**

1919

Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *r.* (5). Aston Charities Trust Ld. *v.* Metropolitan Borough of Stepney - - - - **C.A. 642**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*), (5). Wates *v.* Rowland - - **C.A. 12**

—— —— *s.* 2 (3) (6). Beck *v.* Newbold **C.A. 752**

—— —— *s.* 12 (2). Hayward *v.* Marshall. Winchester *v.* Sharpe - **C.A. 89**

1921

Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 18. Green *v.* Thames Launches Ld. - - **Lord Goddard C.J. 725**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 11 (1). Beck *v.* Newbold - - **C.A. 752**

1925

Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 24. Regina *v.* Kent Justices. *Ex parte* Machin - **Divl.Ct. 355**

Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1 (4). Curtin *v.* Curtin **Divl.Ct. 552**

—— —— *ss.* 1 (4), 2 (2). Hewitt *v.* Hewitt - - - **Divl.Ct. 627**

1927

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 18. Haviland *v.* Long (Dunn Trust Ld. Third Parties) - - - - **C.A. 80**

1928

Agricultural Credits Act, 1928 (18 & 19 *Geo.* 5, *c.* 43), *s.* 5 (1) (5). Barclays Bank Ld. *v.* Beck - - - **C.A. 47**

Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 2. Thompson *v.* Milk Marketing Board - - - - **C.A. 817**

1930

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch.* 1. Blenkin *v.* Bell. **Divl.Ct. 620**

1933

Pharmacy and Poisons Act, 1933 (23 & 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (iii). Pharmaceutical Society of Great Britain *v.* Boots Cash Chemists (Southern) Ld. **Lord Goddard C.J. 795**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *Sch.* 1, *para.* (*d*). Hyde *v.* Pimley - - - - **C.A. 506**

Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 8, 9. Blenkin *v.* Bell - - - - **Divl.Ct. 620**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 164. Taylor (*formerly* Ryan) *v.* Cheltenham and Hereford Breweries Ld. - - - **C.A. 493**

Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *Sch.* 1. Blenkin *v.* Bell. **Divl.Ct. 620**

1935

Government of India Act, 1935 (25 & 26 *Geo.* 5, *c.* 42). Sayce *v.* Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State - - - **C.A. 390**

1936

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 9 (4). Rawlance *v.* Croydon Corporation - - **C.A. 803**

Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *ss.* 75, 301. Regina *v.* Nottingham Quarter Sessions. *Ex parte* Harlow - - **Divl.Ct. 601**

1937

Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *ss.* 4, 47. Ebbs *v.* James Whitson & Co. Ld. - **C.A. 877**

—— —— *s.* 14. Benn *v.* Kamm & Co. Ld. **C.A. 127**

—— —— *ss.* 14, 16, 119. Norris *v.* Syndic Manufacturing Co. - - **C.A. 135**

—— —— *s.* 25 (1). Latimer *v.* A.E.C. Ld. **C.A. 701**

—— —— *s.* 151. Garrard *v.* A. E. Southey & Co. and Standard Telephones and Cables Ld. - - - **Parker J. 174**

—— —— *s.* 151 (6). Street *v.* British Electricity Authority - **C.A. 399**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 9 (2), 10 (1). Moses *v.* Lovegrove - - - **C.A. 533**

Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 (3). Feyereisel *v.* Turnidge - **C.A. 29**

—— —— Sch. Wates *v.* Rowland **C.A. 12**

Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *ss.* 2, 7. Vamvakas *v.* Custodian of Enemy Property. **Ormerod J. 183**

1944

Town and Country Planning Act, 1944 (7 & 8 *Geo.* 6, *c.* 47), *ss.* 57, 58. Aston Charities Trust Ld. *v.* Metropolitan Borough of Stepney. **C.A. 642**

1945

Law Reform (Contributory Negligence) Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 28), *s.* 1 (1). Drinkwater *v.* Kimber - - **C.A. 281**

—— —— *ss.* 1, 4. Jones *v.* Livox Quarries Ld. - - - - **C.A. 608**

1946

Acquisition of Land (Authorization Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 15. Hanily *v.* Minister of Local Government and Planning. **Parker J. 444**

Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5. Regina *v.* St. Helens and Area Rent Tribunal. *Ex parte* Pickavance. **C.A. 370**

1947

Indian Independence Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 30). Sayce *v.* Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State - - - **C.A. 390**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (2) (3). Burgess *v.* Jarvis and Sevenoaks Rural District Council - **C.A. 41**

—— —— *s.* 43. Hanily *v.* Minister of Local Government and Planning **Parker J. 444**

—— —— *s.* 75 (1), (9). Buckingham County Council *v.* Callingham - **C.A. 515**

1948

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—— —— *ss.* 57 (3), 70 (1), 99. Gulliver *v.* Catt - - - - **C.A. 308**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 352 (1), 353 (1) (2) (3) (5) (6). Tyman's Ld. *v.* Craven - **C.A. 100**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29, *Sch.* 9. Regina *v.* Kent Justices. *Ex parte* Machin. **Divl.Ct. 355**

National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43. National Assistance Board *v.* Wilkinson. **Divl.Ct. 648**

1949

Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 11 (1). Regina *v.* St. Helens and Area Rent Tribunal. *Ex parte* Pickavance. **C.A. 370**

Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *ss.* 1, 2, 4, 8, 12 (3). Regina *v.* Manchester Legal Aid Committee. *Ex parte* R. A. Brand & Co. Ld. - - - **Divl.Ct. 413**

Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *ss.* 1 (*b*), 11 *and* 15 (1). Holland *v.* Perry - - **Divl.Ct. 923**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 3 (1) (*c*). Hitchcock *v.* W. B. and F. E. B. - - - **Divl.Ct. 561**

1951

Leasehold Property (Temporary Provisions) Act, 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2); *s.* 12 (3) (*b*) *and* *s.* 20 (1). Pegler *v.* Craven. **C.A. 69**

—— —— *ss.* 10, 12. John Kay Ld. *v.* Kay. **C.A. 258**

—— —— s. 12. Tyman's Ld. *v.* Craven. **C.A. 100**

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Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145). Garrard *v.* A. E. Southey & Co. and Standard Telephones and Cables Ld. **Parker J. 174**

County Court Rules, 1936. *Ord.* 25, *r.* 6. Goldthorpe *v.* Bain - - **C.A. 455**

Defence (General) Regulations, 1939 (*S.R. & O.* 1939, *No.* 927), 56A (2). A. Smith & Son (Bognor Regis) Ld. *v.* Walker - - - - **C.A. 319**

—— —— *regs.* 90 (1), 55AB. Gardner *v.* Akeroyd - - - **Divl.Ct. 743**

Gold Wares (Standard of Fineness) Order, 1932 (*S.R. & O.* 1932, *No.* 654). Westwood *v.* Cann - - **C.A. 887**

Horizontal Milling Machine Regulations, 1928 (*S.R. & O. No.* 548, *as amended by* 1934, *No.* 207), *Reg.* 3. Benn *v.* Kamm & Co. Ld. - - **C.A. 127**

Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *art.* 2. Regina *v.* Industrial Disputes Tribunal. *Ex parte* Practical Banking Ld. **Divl.Ct. 662**

Legal Aid (Assessment of Resources) Regulations, 1950 (*S.I.* 1950, *No.* 1358). Regina *v.* Manchester Legal Aid Committee. *Ex parte* R. A. Brand & Co. Ld. - - - **Divl.Ct. 413**

Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359). Regina *v.* Manchester Legal Aid Committee. *Ex parte* R. A. Brand & Co. Ld. **Divl.Ct. 413**

Meat (Prices) (Great Britain) (No. 2) Order, 1951 (*S.I.* 1951, *No.* 1313). Gardner *v.* Akeroyd - - - **Divl.Ct. 743**

Metalliferous Mines General Regulations, 1938 (*S.R. & O.* 1938, *No.* 630 *as amended by S.R. & O.* 1945, *No.* 1351), *regs.* 7 (3), 14 (1) (7), 15 (1) (2) (3) (10). Stapley *v.* Gypsum Mines Ld. **C.A. 575**

Motor Vehicles (Variation of Speed Limits) Regulations, 1950 (*S.I.* 1950, *No.* 1705), *r.* 2. Blenkin *v.* Bell. **Divl.Ct. 620**

Pedestrian Crossings (London) Regulations, 1951 (*S.I.* 1951, *No.* 1139), *reg.* 4. Leicester *v.* Pearson - **Divl.Ct. 668**

R.S.C., Ord. 19, *r.* 7. Reiss *v.* Woolf. **C.A. 557**

—— *Ord.* 21, *r.* 2. Arab Bank Ld. *v.* Ross **C.A. 216**

—— *Ord.* 22, *r.* 14 (3) (9). Taylor (*formerly* Ryan) *v.* Cheltenham and Hereford Breweries Ld. - **C.A. 493**

ERRATA

P. 305. Reference at foot of page. For [1952] 1 K.B. 84 read [1952] 2 Q.B. 84.

Pp. 601, 602, 606 and 607. References [1951] 2 K.B. 308 should read [1951] 2 K.B. 508.

P. 868. Reference (1792) 4 T.R. 598 should read (1792) 4 T.R. 589.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

REGINA *v.* DURHAM QUARTER SESSIONS. *Ex parte* VIRGO.

1952
Feb. 14.

Lord Goddard C.J., Jones and Parker JJ.

Criminal Law—Appeal—Plea of guilty—Charge of larceny—Plea of guilty before justices—Defendant's statement before sentence that he took article by mistake—Appeal against conviction heard by quarter sessions—Case remitted to justices—Power of quarter sessions to decide whether plea one of guilty or not guilty.

On an appeal against conviction by justices, quarter sessions are not precluded from considering whether a plea of guilty which the defendant made at his trial was in all the circumstances one of guilty or not guilty, and can entertain the appeal to that extent.

An unrepresented defendant pleaded guilty before a court of summary jurisdiction to stealing a motor-bicycle. Before sentence was passed on him he made a statement to the effect that his taking of the motor-bicycle was a mistake as he thought it belonged to a friend of his who had told him to take it home. The justices did not direct that his plea of guilty should be withdrawn and passed sentence on him. At the hearing of the defendant's appeal against conviction, quarter sessions decided that the justices should have entered a plea of not guilty in view of the defendant's statement, and they remitted the case to the justices with a direction that the plea should have been one of not guilty.

On the prosecutor's application for an order of certiorari and of prohibition:—

1952

REGINA v. DURHAM QUARTER SESSIONS. *Ex parte* VIRGO.

Held, that the defendant's statement showed that he was in fact pleading not guilty and should have been entered as such; and that quarter sessions were right in entertaining the appeal to the extent of treating the proceedings before the justices as a nullity and had properly remitted the case to the justices.

Rex v. *West Kent Quarter Sessions; Ex parte Files* [1951] W.N. 440 considered and distinguished.

Observations of Lord Goddard C.J. on the last paragraph of his own judgment in that case.

APPLICATION for an order of certiorari and an order of prohibition.

The defendant, Thomas Morrison Bruce, appeared on July 30, 1951, before a court of summary jurisdiction for the county borough of South Shields on a charge of stealing a motor-bicycle. He elected to be tried summarily and pleaded guilty. No evidence was called and the solicitor acting for the prosecution told the justices the facts, which the defendant, who was not represented, did not dispute. On being asked whether he had anything to say, the defendant said: "It was a mistake, I thought it was my "mate's cycle. My mate said: 'Take it home.' My mate's "bike is identical." The justices after hearing that statement made no alteration in the defendant's plea, heard his record and sentenced him to six months' imprisonment.

The defendant asked to see a solicitor and was granted legal aid. He was later released on bail and appealed to the appeals committee of Durham quarter sessions against his conviction and sentence.

At the hearing of the appeal counsel for the prosecution objected that as the defendant had pleaded guilty he had no right of appeal against his conviction, and that quarter sessions could not enter into any inquiry of the matter at all. After hearing what the defendant had told the justices before he was sentenced, quarter sessions decided that the justices ought to have entered a plea of not guilty, and they therefore sent the case back to the justices under their powers contained in the Summary Jurisdiction (Appeals) Act, 1933, s. 1 (1) (vii).

The applicant, police constable Ronald Virgo, applied for an order of certiorari to bring up and quash the order of the appeals committee of Durham quarter sessions and an order prohibiting quarter sessions from further hearing the case. The orders were sought on the grounds that quarter sessions had no jurisdiction to entertain the defendant's appeal against conviction; that they were bound to treat the appeal as one against sentence only; and that the court of summary jurisdiction had no power to re-open a case which they had previously heard and determined.

C. Michael Hughes for the applicant. Section 36 (1) of the Criminal Justice Act, 1948, confers a right of appeal on a person convicted by a court of summary jurisdiction. If he pleaded guilty, his only appeal is against sentence. Here the defendant clearly pleaded guilty. In *Rex* v. *West Kent Quarter Sessions; Ex parte Files*,[1] the Divisional Court issued an order of prohibition where quarter sessions had purported to hear the appeal against conviction of a defendant who had pleaded guilty to an offence against section 11 of the Road Traffic Act, 1930; and the applicant here relies on the concluding paragraph of Lord Goddard C.J.'s judgment.

The present case is to be distinguished from *Rex* v. *Graham Campbell; Ex parte Moussa*,[2] as there the defendant did not expressly plead guilty, but merely admitted that he was an Egyptian on a charge of having failed to register as an alien. *Rex* v. *Ingleson* [3] does not apply as it was an appeal from quarter sessions to the Court of Criminal Appeal and so was governed by the Criminal Appeal Act, 1907. Quarter sessions here had no power to remit the case to petty sessions under section 1 (1) (vii) of the Summary Jurisdiction (Appeals) Act, 1933, as the defendant had pleaded guilty.

Vernon Gattie for quarter sessions. Quarter sessions were right in their decision that a plea of guilty had been wrongly entered. When the defendant made his statement to the justices he was not asserting his innocence for the first time: he had protested that it was his mate's bicycle immediately the police stopped him. It is common knowledge that persons often plead guilty in ignorance of all the legal consequences of such a step. The justices should have regarded the defendant's statement as a plea of not guilty. His plea of guilty was not an unequivocal one, and it is submitted that it must be such before *Rex* v. *West Kent Quarter Sessions; Ex parte Files*,[1] applies. The decision in *Rex* v. *Graham Campbell; Ex parte Moussa*,[2] shows that there may be an appeal against conviction where the plea of guilty, as here, was not unequivocal.

J. R. Johnson for the defendant Bruce supported the argument of counsel for quarter sessions.

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[1] [1951] W.N. 440.
[2] [1921] 2 K.B. 473.
[3] [1915] 1 K.B. 512.

LORD GODDARD C.J. [after stating the facts]:—The question is really whether *Rex* v. *West Kent Quarter Sessions; Ex parte Files*,[4] applies to this case, or whether there is a distinction. Many cases, which were referred to in the argument, have been before the court raising in one form or another the question whether or not a plea of guilty had properly been entered. In *Rex* v. *Graham Campbell; Ex parte Moussa*,[5] a man was charged with a breach of the Aliens Act because he had not registered. He was apparently an Egyptian and was brought before the magistrate charged with having failed to register as an alien. Instead of asking him in the ordinary way whether he pleaded guilty or not guilty, according to the practice which at that time obtained in the metropolitan police courts, the clerk said to him: " Are " you an Egyptian? " and he replied: " Yes, I am "; and that was construed as meaning that he was an alien. He was then asked whether he had failed to notify the registration officer of a change of address, and he said that he had, and he was accordingly convicted. He desired to appeal to quarter sessions, but that court upheld the objection that he had pleaded guilty and that he had no appeal to quarter sessions. The Divisional Court decided that he had not pleaded guilty and therefore granted mandamus to the London Sessions to hear the appeal.

Rex v. *Graham Campbell; Ex parte Moussa*,[5] is not quite in pari materia with the present case, because there the defendant had never been directly asked the question, " Are you guilty or " not guilty "; he had been asked whether he was an Egyptian and he had said that he was. The view of Avory J., who dissented in that case, was that that was an admission that he was an alien; and that having admitted that he had not notified the change of address, he had then admitted the truth of the information. The other two judges, however, thought that he had not, because although he said that he was an Egyptian, he might have contended that he was nevertheless a British subject.

Rex v. *Ingleson* [6] came before the Court of Criminal Appeal, which no doubt has wider powers than the court of quarter sessions, and is a case to which we ought to pay attention. Except as regards the court where the incidents took place it is singularly like this case. The prisoner was charged with stealing and receiving and pleaded guilty. At the same time he handed up a statement to the recorder which, as Lord

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[4] [1951] W.N. 440.

[5] [1921] 2 K.B. 473.

[6] [1915] 1 K.B. 512.

Coleridge J., who gave the judgment of the court, said, if believed was a complete exculpation, and which concluded with the words: "I am guilty of taking the horses not "knowing them to be stolen." The court held that although the prisoner said that he was guilty that amounted to a plea of not guilty, because he said that he did not know that they were stolen. The court allowed the appeal from quarter sessions and said that a plea of not guilty must be entered and that the case must go back for rehearing. The Court of Criminal Appeal in that case, therefore, did exactly what quarter sessions did in the present case; they treated the proceedings before the justices as a nullity because the trial proceeded before the justices on the footing that the prisoner had pleaded guilty when in fact the court thought that a plea of not guilty ought to have been entered. They accordingly said that the proceedings consequent on the plea were bad, that a plea of not guilty must be entered, and that the case must go back for rehearing.

This matter was very much considered by the Divisional Court in *Rex* v. *West Kent Quarter Sessions; Ex parte Files*,[7] where, however, the facts were altogether different. A man of considerable education was charged with dangerous driving, and the report shows first of all that he had been served with the summons. I said, in giving judgment: "Unless the applicant is blind, cannot "read, or is mentally defective—none of which is suggested— "there can be no doubt whatsoever that he must have understood "that with which he was being charged. . . . That goes to merits, "perhaps, and not to jurisdiction. The evidence shows that the "clerk of the court read out verbatim the full particulars of the "charge as shown in the information." The charge was one of driving a motor vehicle on a road at a speed which was dangerous to the public, contrary to section 11 (1) of the Road Traffic Act, 1930; and the particulars were that on February 3, 1951, at the parish of Northfleet, the defendant unlawfully drove a motor-car on a road called Watling Street at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the road. He had been served with that summons so he knew exactly what the charge was. That summons was read verbatim to him by the clerk, who then asked him if he was legally represented, and the defendant said that he was not. The clerk said that it was a serious charge and then informed the defendant in formal language of his right to be tried by a jury at quarter sessions. Before he took his reply he explained to him in simple language exactly what that meant, and the defendant answered: "I want to be dealt with this "morning." The clerk said: "In that case do you plead guilty "or not guilty?" and the defendant replied: "Guilty." The clerk again said to the defendant: "You are quite certain about "that? You admit the offence, do you?", and the defendant said that he did.

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[7] [1951] W.N. 440.

In those circumstances there was no question but that the defendant not only pleaded guilty but intended to plead guilty. He appealed to quarter sessions and succeeded in persuading quarter sessions to hold an inquiry whether he had pleaded guilty under a mistake. Quarter sessions, for reasons which no doubt appeared good to them but which this court entirely failed to understand, said that they had come to the conclusion that the defendant had made a mistake, and entertained his appeal. The Divisional Court decided that quarter sessions should not have done so because the defendant was a man who in court deliberately and intentionally, after being warned, pleaded guilty. If everybody who pleaded guilty and found that the sentence was one which he did not like could appeal to quarter sessions against his conviction there would be no end to it. But this case, I think, is distinguishable.

It is true that in *Rex* v. *West Kent Quarter Sessions; Ex parte Files*,[7] I concluded my judgment by saying: "It is not the case "of a court inquiring into matters to find out whether they had "jurisdiction or not. On the face of the proceedings before the "court was a statement by the defendant that he pleaded guilty. "In those circumstances, quarter sessions had no right to hear "the appeal, and they must be prohibited from entertaining it." I think that the concluding words of my judgment go too far. I think that where the question is whether or not the plea which is put in by the prisoner at the hearing before the justices amounted to a plea of guilty or not guilty, that is a matter which the court can entertain. I think that it would be putting it too high against an unrepresented prisoner who had pleaded guilty, but before being sentenced had made a statement to the court which showed that he meant to deny that he had acted feloniously or criminally, to insist that as he had said he pleaded guilty that was therefore

[7] [1951] W.N. 440.

an end of the matter. It must not be taken that the concluding words of my judgment in the *West Kent* case [7] preclude courts of quarter sessions from considering whether the plea which was made at the trial, taking all that the prisoner said into account, was a plea of guilty or not guilty.

The present is not a case of a prisoner who has unequivocally pleaded guilty and then appeals on the ground that his plea was a mistake; it is a case in which the prisoner at the trial said: "Guilty, but" and added a rider to his plea of guilty which showed that he was really pleading not guilty, and which ought to be interpreted by the court as a plea of not guilty.

We think that the court of summary jurisdiction here ought to have entered a plea of not guilty, and then the case could have been tried. If they had convicted the defendant he would have had a right to go to quarter sessions. His appeal to quarter sessions against his conviction was really based on his contention that he pleaded not guilty but a plea of guilty was wrongly recorded. The justices at quarter sessions, having come to the conclusion that the plea of guilty was wrongly recorded, not because the prisoner did not understand or did not intend to plead as he did, but because his plea, taken as a whole, amounted in law to a plea of not guilty, were right, I think, in entertaining the appeal to this extent, that as the man had never been tried on a plea of not guilty they were entitled to treat the trial, as the court did in *Rex* v. *Ingleson*,[8] as a nullity. They therefore rightly exercised the power which they had under section 1 (1) (vii) of the Summary Jurisdiction (Appeals) Act, 1933, of sending back the case to petty sessions with an expression of their opinion.

This court think that quarter sessions handled this case quite properly and that the order which they made sending it back with a direction to petty sessions that the plea should be one of not guilty and that the case should be heard, was a proper one. The application for an order of certiorari and of prohibition is refused.

JONES J. I agree.

PARKER J. I agree.

Application refused.

Solicitors: *Speechly, Mumford & Craig, for Harold Ayrey, South Shields; Sharpe, Pritchard & Co., for J. K. Hope, Durham; H. Pollard, South Shields.*

S. C.

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[7] [1951] W.N. 440.

[8] [1915] 1 K.B. 512.

C. A.

1952
Feb. 11.

Somervell and Denning L.JJ. and Roxburgh J.

JEFFERY *v.* JOHNSON.

Bastardy—Corroboration—Alleged letter from respondent to complainant —No evidence of respondent's handwriting other than that of complainant—Whether statute satisfied—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

By section 4 of the Bastardy Laws Amendment Act, 1872, it is provided that "if the evidence of the mother be corroborated "in some material particular by other evidence to the satisfaction "of the said justices, they may adjudge the man to be the putative "father of such bastard child."

The statute does not necessitate the corroboration of evidence of the complainant by testimony other than that of the complainant herself.

If the complainant produces a letter which corroborates her story in a material particular, and she proves that the letter is in the handwriting of the putative father, the justices may, in their discretion, admit the letter as corroboration within the meaning of the statute. It is the contents of a letter, and not the identification of the handwriting by the complainant, which provides the corroboration.

Johnson v. *Pritchard* (1933) 97 J.P.N. 754 and *Moore* v. *Hewitt* [1947] K.B. 831, on this point, overruled. Reasoning of Lord Goddard C.J. in *Moore* v. *Hewitt*, supra, followed.

Decision of the Divisional Court, which held itself bound by *Johnson* v. *Pritchard*, supra, reversed.

Appeal from Divisional Court.

On August 31, 1950, the complainant, Christine Mary Jeffery, gave birth to a child of which she alleged that the defendant, James Johnson, was the father. On April 23, 1951, she took out a summons for an affiliation order before the justices at Tenby, Pembrokeshire. She gave evidence of having lived with the defendant as man and wife at the material dates, and also put in a letter, which she swore was in the handwriting of the putative father and which corroborated her story in (it was contended) a material particular. The justices admitted the letter as corroboration and ordered the defendant to pay the claimant £1 a week.

On the application of the respondent the justices stated a case for the opinion of the Divisional Court, and that court on October 11, 1951, reversed the decision of the justices, holding itself bound by the decision in *Johnson* v. *Pritchard*,[1] in which the Divisional Court had held that a complainant cannot corroborate herself by saying that a letter produced by her was written to her by the putative father.

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[1] (1933) 97 J.P.N. 754.

The complainant appealed.

W. A. Hemming for complainant.

S. L. Clark for respondent.

SOMERVELL L.J. stated the facts and, having read section 4 of the Bastardy Laws Amendment Act, 1872, continued:—In the proceedings before the justices the complainant gave evidence to the effect that at the material dates, for some six months, she and the putative father had lived at Bodmin as man and wife; that she became pregnant to her knowledge in December, 1949; that he left her in March and went to live at Tenby; and he paid her various sums. Then she put in and sought to rely on a letter which she swore was in his handwriting. She had been asking for money during the time of her pregnancy. In the letter he said: "By your letter you think I have to send you money. No, I "haven't got to yet. This is done just to help you out. As "soon as you get the kid you will work and I will send maintenance." It is a letter which, if accepted as coming from the putative father, plainly indicates, to my mind, that he was recognizing himself as the father of the child. The question is whether, in those circumstances, that can be relied on as corroboration in some material particular. The respondent was before the justices, and was represented by solicitors, who submitted that he had no case to answer. He asked the justices to state a case, which they did.

The history of the law on this matter is this: in Stone's Justices Manual (65th ed.), at p. 409, which was the edition current in 1933, there appeared this note: "While, as a matter "of prudence, it is desirable that the handwriting should be "proved by other testimony than that of the woman, we are of "opinion that the evidence alone, if credible, is sufficient for the "purpose, and that letters, when thus proved, may furnish the "corroboration required by the statute." In the year 1933 *Johnson* v. *Pritchard*,[1] a case similar to this, came before justices and there was an appeal to the Divisional Court. It was similar to this in that there was no evidence other than the complainant's and letters written by the respondent. Apart from that there was no evidence relied on as corroboration. The Divisional Court

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[1] 97 J.P.N. 754.

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Somervell L.J.

held, disapproving of the passage in Stone's Justices Manual which I have cited, that a complainant in bastardy proceedings cannot corroborate herself by saying that the letter produced by her was written to her by the alleged father, and the appeal was allowed. The justices in that case had accepted it as corroboration, and the Divisional Court said they were wrong in so doing.

In *Moore* v. *Hewitt* [2] the same point emerged, but with two other points. There were other matters which could be relied on and there was a question as to delay in stating the case. Lord Goddard C.J. dealt with this point and with the decision in *Johnson* v. *Pritchard*.[1] After citing the passage which I have read from the 65th edition of Stone's Justices Manual, he said: "I hope that *Johnson* v. *Pritchard* [1] may some day be considered "in a higher court, but sitting in this court I think we are bound "by it, although we have not had the advantage of seeing any "report which shows the reasoning of the court. The difficulty "which I have in accepting the case is this: The statute does not "require the whole of the mother's evidence to be corroborated; "if it did, it would mean that the case could be proved, or in "many cases could be proved, without calling the mother herself. "The mother's evidence in *Johnson* v. *Pritchard* [1] seems to have "been this: First of all she swore that the man was the father "of her child, and next that two letters which she had received, "and which she produced, were in the respondent's handwriting. "If the letters were admissible on her evidence, the statements "in the letters being written by the man himself were at once "evidence against him. While the production of the letters "would not corroborate the evidence of the complainant that the "respondent wrote them, they would corroborate her evidence "that he was the father of her child. That is a material par"ticular and, therefore, it seems to me that the production of "the letters would afford corroboration in a material particular." He went on to say that so long as *Johnson* v. *Pritchard* [1] stood it bound the Divisional Court, and he hoped it might be considered by a higher court some day. That occasion has now arisen.

I find the same difficulty about *Johnson* v. *Pritchard*,[1] if I may say so, as was found by Lord Goddard. As he said, it is the statements in the letters, being written by the man, which is evidence against him, and the only question is, can the mother herself be a competent witness as to his handwriting? I cannot myself see why she should not. It appeared quite clearly from her primary evidence that she was alleging that the respondent was the father of her child. Then she produces a letter and swears that it is in his handwriting. If that evidence is accepted then the statements in the letter are what become the material corroboration. In my opinion she should be regarded as a competent witness as to the handwriting and *Johnson* v. *Pritchard*[1] was wrongly decided. I would add that I agree with what had been suggested in the wording of the note in the 65th edition of Stone's Justices Manual, that such evidence, no doubt, should be carefully scrutinized.

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[1] 97 J.P.N. 754.

[2] [1947] K.B. 831, 841.

There may be cases where the justices will not, and should not, be satisfied in the absence of some independent evidence or, as is suggested, the calling of the alleged father, who is a compellable witness. But as a matter of law it seems to me open to them to accept her identification of the handwriting, and there may, I think, be many cases where they might well be satisfied, beyond any reasonable doubt, by her evidence. It is a matter which is within their discretion, and they should consider in every case whether it is right to accept it or whether independent evidence as to handwriting should be required.

Mr. Clark raised a subsidiary and different point. He pointed out to us that the provisions of section 6 of the Bastardy Act of 1845, which is still operative with regard to appeals to quarter sessions, used the words " corroborated in some material particu-" lar by other testimony to the satisfaction of the said justices." He said that " testimony " primarily means oral evidence. He referred us to a sentence or two in a case in the Privy Council, *Forget* v. *Baxter*.[3] But when one looks at that case, and the section which was being construed, it is, of course, plain that the word " testimony " in that case meant oral testimony; and if the word " evidence " had been used in that section it equally plainly would have meant oral evidence. Mr. Clark said that in the original section in the Poor Law Amendment Act, 1844, which has now been replaced by section 4 of the Act of 1872, the word now changed to " evidence " was " testimony." I think the words in their context in those two sections mean the same thing and what, as Lord Goddard C.J. said, is plainly evidence, namely, the statements in the letter, once proof of the handwriting has been accepted, would equally be testimony if the matter came on appeal before the court of quarter sessions. For those reasons I think this appeal should be allowed.

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[1] 97 J.P.N. 754.

[3] [1900] A.C. 467, 475.

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DENNING L.J. The evidence of the mother can be divided into two parts. First, the part in which she proves orally that the man was the father; secondly, the part in which she proves the handwriting of the letter. It is the first part, her evidence as to paternity, which needs corroboration. That corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be that of the man. Once the handwriting is proved, the contents prove themselves, rather in the nature of real evidence like an exhibit which, once it is properly identified, proves itself. Her evidence as to paternity is, therefore, corroborated by other evidence, namely, the contents of the letter. I agree that the appeal should be allowed.

ROXBURGH J. I agree, for the reasons given by my Lord.

Appeal allowed.

Solicitors: *G. Howard & Co.; Rowley, Ashworth & Co., for Nash, Howett, Cocks & Clapp, Plymouth.*

A. W. G.

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Feb. 6, 7.

Evershed M.R., Jenkins and Hodson L.JJ.

WATES *v.* ROWLAND AND ANOTHER.

[Plaint No. G. 992.]

Landlord and Tenant—Rent restriction—Increase of rent—Improvement or structural alteration—Concrete foundations of house raised—Whether a "repair"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*), (5)—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch.*

The water level having for some reason risen, water had seeped in between the concrete foundations on which the floor joists were laid and the floor of a dwelling-house, with the result that the floor had rotted causing a nuisance. The sanitary inspector having served a notice requiring the nuisance to be abated, the landlord laid a further layer of concrete on the original concrete foundation raising the surface by nine inches. On that surface he laid a tiled floor. The house being within the protection of the Rent Restriction Acts, the landlord, on the completion of the works,

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served a notice on the tenant increasing the rent by eight per cent. of the cost of the work, less an allowance for the cost of reflooring. The tenant refused to pay the increase on the ground that although the works in question might be an "improvement" or "structural "alteration" they were "repairs" and accordingly the landlord was not entitled to raise the rent under the power conferred by section 2 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939. The county court judge dismissed the landlord's proceedings to recover the increased rent. On appeal:—

Held, that work required in order to make a dwelling-house fit for habitation was not necessarily "repairs" within the meaning of the section. It might be an "improvement" or "structural "alteration," expenditure on which ranked for increased rent under section 2 (1) (*a*) of the Act of 1920. It was a matter of degree whether such expenditure constituted "an improvement" or "structural alteration." The expenditure by the landlord on the addition of nine inches of concrete to the substratum of the house was prima facie expenditure on an "improvement," since the house was a better house than it had ever been before. There was no sufficient ground for holding that this expenditure was to be excluded from consideration on the ground that it was expenditure on repairs. Up to a point the work done was work of repair. The replacement of the floor would come within the description "repairs" which would not rank for the eight per cent. increase. The landlord had, however, done more than provide a new floor. He had made a structural alteration and an improvement consisting of the laying of the additional concrete bed over the existing concrete. There might be an "improvement" in the way of a "structural "alteration" or otherwise which was not "unnecessary" within the meaning of the proviso to the subsection, which could not be regarded as merely "repairs" within the meaning of the definition of that word in section 2 (5) of the Act.

Decision of the county court judge reversed.

Strood Estates Co. Ld. v. *Gregory* [1936] 2 K.B. 605 considered.

Rabbitt v. *Grant* [1940] I.R. 323 not followed.

APPEAL from Judge Hurst sitting at Croydon county court.

The defendants, William Rowland and Ada Rowland, were the tenants of 210 Rowan Road, Mitcham, a dwelling-house within the protection of the Rent Restriction Acts, of which the plaintiff, Norman Wates, was the landlord. The ground floor of the house consisted of concrete on which were wooden joists and a wooden floor was laid on those joists in the usual way. That construction was adequate when the house was built. Latterly, however, the water level had for some reason risen, with the result that water had seeped into the cavity between the concrete and the wooden floor, which had as a consequence rotted, and a nuisance had resulted. On November 3, 1950, the sanitary inspector of the district served a formal notice on the landlord requiring him to abate the nuisance by laying concrete so as to raise the site and to re-lay the flooring and to do certain consequential works. There was some co-operation between the local authority and the landlord with regard to this notice, inasmuch as the service of the notice helped the landlord to obtain the necessary licences. The landlord complied with that notice, laying a further layer of concrete over the original concrete and raising the surface some nine inches. On the surface so raised, a tiled floor was laid in place of the original floor. The works having been completed, the landlord by notice in writing of March 1, 1951, increased the rent of the premises from April 2, 1951, by a sum equal to 8 per cent. of the cost of the works. In these proceedings the landlord sought to recover the increased rent. The sole issue between the parties was whether, on the true construction of the Rent Restriction Acts, the expenditure which the landlord had incurred was an expenditure qualifying for the statutory percentage increase.

It had been agreed between the parties that, in the event of the landlord's claim succeeding, the statutory increase should be calculated upon the cost of laying the addition to the concrete bed under the house with an appropriate allowance for the cost of providing the tiled flooring, which was for this purpose to be regarded as a replacement of or a substitute for the old wooden flooring.

The county court judge in the course of his judgment said: "Speaking in the popular sense, I should have no hesitation in "saying that the expenditure had been incurred in relation to "'improvements' to the tenant's flat, but that is not the issue "I have got to decide; I have to decide whether such improvements are distinct from 'repairs,' and in order to arrive at a "true view as to whether such distinction can be made I am "governed by authority.

"In the present case, I think it was implicit in the service "of the sanitary inspector's notice that the existing dampness of "the floor prevented these premises from being described as being "in good and tenantable repair. . . . In my view, I am governed "by the decision in *Rabbitt* v. *Grant*.[1] In that case a sanitary "notice had been served and as a result the inadequate earth "privy was superseded by a modern water-closet. In the present

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[1] [1940] I.R. 323.

"case I think a defective flooring has been superseded by an "efficient floor, and although it is obviously a very great 'improve-"'ment' in the premises, the fact that it is also aptly describable "as a 'repair' of a bad system of flooring in order to make "defective flooring usable and the premises habitable prevents "the plaintiff, in my view, from claiming the benefit of the 8 per "cent. increased rent. Against this, I have been referred to the "case of *Strood Estates Co. Ld.* v. *Gregory*,[2] in the Court of "Appeal, a decision in which the works related, according to "Lord Merriman P., to the substitution of modern drainage to "the satisfaction of the local authority, and that seems very "similar to what has happened in the present case."

The judge referred to the circumstances that there had been no sanitary notice served in the *Strood* case,[2] and to the absence from the report of any details about the work done in that case, and he went on to say: "I feel, however, that the case before "the Irish courts is one which is so closely analogous to the "present that it would be dangerous for this court to go behind it "to the earlier decision in the Court of Appeal."

The landlord appealed.

Ian Baillieu for the landlord. It is submitted that the laying of this additional depth of concrete constituted an "improve-"ment" within section 2 (1) (*a*) of the Rent and Mortgage Interest (Restrictions) Act, 1920.[3] This work is more than a repair required for the purpose of keeping the premises in good and tenantable repair, since the premises after the work was done were better premises than when they were built. It is implicit in the proviso to paragraph (*a*) of subsection (1) that there may be improvements or statutory alterations which are necessary to keep premises in good and tenantable repair. The statutory increase is not limited to unnecessary improvements. Indeed, under the proviso a tenant may object to pay the statutory increase on expenditure which was unnecessary. The landlord relies on the decision in *Strood Estates Co. Ld.* v. *Gregory*,[4] which shows that structural alterations, though being necessary to make premises fit for habitation according to modern standards and so in one sense repairs, may constitute improvements within section 2 (1) (*a*).

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[2] [1936] 2 K.B. 605.

[3] The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939) authorizes an increase of the standard rent: "(*a*) Where the land-"lord has since September 2, 1939, "incurred, or hereafter incurs, expen-"diture on the improvement or struc-"tural alteration of the dwelling-house "(not including expenditure on decora-"tion or repairs), an amount calculated "at a rate per annum not exceeding "8 per cent. of the amount so ex-"pended: . . . Provided that the "tenant may apply to the county court "for an order suspending or reducing "such increase on the ground that such "expenditure is or was unnecessary "in whole or in part, and the court "may make an order accordingly."

Subs. (5): "For the purposes of "this section, the expression 'repairs' "means any repairs required for the "purpose of keeping premises in good "and tenantable repair."

David Humphreys for the tenants. The county court judge was right. Whether these works are "repairs" or "improvements" is a question of fact and his decision should not be disturbed. *Rabbitt* v. *Grant*[5] was rightly decided. Where works have been executed which are necessary to abate a nuisance and bring premises into a state of tenantable repair the works are "repairs," not "improvements."

JENKINS L.J. [after stating the facts]:—It has been suggested on behalf of the tenants that the judge should be understood, in his judgment, to have found as a fact that although the expenditure had been incurred in relation to "improvements" in the popular sense of that expression, nevertheless the work in question also answered the description of "repairs," and that that being so, on the facts, the expenditure was not within section 2 (1) (*a*) of the Act of 1920 as amended by the Act of 1939. I cannot read the judgment as involving a finding of fact to that effect. Looked at as a whole, I think it comes to this, that the judge, if the matter had been free from authority, would have been disposed himself to find on the facts that the work here done did amount to an "improvement" in the ordinary popular sense of that expression, but he felt himself constrained by the authority of the Irish case, *Rabbitt* v. *Grant*,[5] to hold that the expenditure in question was also an expenditure on repairs, and that therefore the landlord was excluded from the benefit of the statute. Accordingly, I think the question raised before us can properly be described as a question of law, that is to say, whether, on the facts of this case, and on the true construction of the relevant statutory provisions, this expenditure, or some part of it, was expenditure on the improvement or structural alteration of the dwelling-house, as distinct from expenditure on repairs, within the meaning of the exception contained in section 2 (1) (*a*).

Mr. Baillieu for the landlord puts his case upon the construction of the section in this way: he says that he has to show an expenditure on an improvement or structural alteration, and that indeed he claims to have shown, for there is no doubt that the floor as it stands at present, with its solid foundation, is a much better floor than the house ever had before. He then points out that if the phrase "not including expenditure on decoration or "repairs" is read in conjunction with the definition of "repairs," one finds that what is excepted is expenditure on any "repairs" —not, be it observed, on any work of any kind—required for the purpose of keeping the premises in good and tenantable repair. He meets the judge's decision, so far as it is based on the view that with the floor as it was before the work was done the premises could not be described as being in good and tenantable repair, in this way: he says that the mere fact that work is necessary to put premises into good and tenantable repair does not conclude the matter against him, for "repairs," by definition, means repairs required for the purpose of keeping the premises in good and tenantable repair, and there may well be work required for that purpose which, however, does not fairly answer the description of "repairs"; as, for instance, where for the purpose of making a structure originally defectively designed a structure in good and tenantable repair, it is necessary to make structural alterations and improvements, in the sense of making an addition or alteration to the premises, which does not merely restore the premises to a condition approximating to the condition that they were in when new, but does make the premises in some way better in kind than they ever were before.

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[4] [1936] 2 K.B. 605.

[5] [1940] I.R. 323.

The other point of construction taken for the landlord is to be found in the proviso: "Provided that the tenant may apply "to the county court for an order suspending or reducing such "increase on the ground that such expenditure is or was unneces-"sary." That implies that there must be some improvements or structural alterations which can be made to a dwelling-house which are necessary, and thus supports the view that an improvement or structural alteration is not necessarily ruled out from ranking for the statutory percentage merely because it can be described as a necessary improvement or structural alteration, e.g., as being required for keeping the premises in good and tenantable repair or making them fit for human habitation. To hold otherwise, it is pointed out, might lead to the result that no improvement or alteration could ever rank for the percentage, because if it was required for the purpose of keeping the premises in good and tenantable repair it would be a repair, and therefore would be excluded from the benefit of the section; whereas, if it did something more than that, the tenant might raise an objection on the ground that the work was "unnecessary."

We have been referred in the course of the argument to *Strood Estates Co. Ld.* v. *Gregory*.[6] There the landlord had incurred expenditure in substituting a modern system of drainage for an old and antiquated system, and the question was whether that expenditure ranked for the statutory percentage by way of increase of rent, and it was held by Lord Merriman P., who delivered the judgment of the court, that the expenditure in question did so rank. There had been, as the county court judge observed, no sanitary notice served in that case, but it does seem from the report[7] that evidence had been given by the chief sanitary inspector of the local authority that the house before the work was done was not in all respects fit for habitation in accordance with section 1 of the Housing Act, 1925. The argument in the *Strood Estates* case[6] took a different course from the argument before us, but it does, I think, to some extent assist the landlord's contention. The argument there was that under section 1 of the Housing Act of 1925, in the case of houses of a class which included the house in question, there was to be implied in the contract of letting an undertaking that the house would be kept by the landlord during the tenancy in all respects reasonably fit for human habitation. That being an undertaking to be implied in the contract, it was argued that inasmuch as, in substituting the new system of drainage, the landlord had done no more than he was obliged to do by this statutory term of the tenancy, he could not claim any right to the increase. Lord Merriman P. dealt with that argument mainly by reference to the proviso as to expenditure on unnecessary matters, and he said[8]: "As the "subject-matter is a dwelling-house, it may, I think, fairly be "assumed that in using the word 'unnecessary' the legislature "meant that the work in respect of which the expenditure was "incurred must be necessary for the purpose for which a dwelling-"house is used—namely, for human habitation"; and it was pointed out, in effect, that if the argument based upon section 1 of the Housing Act, 1925, was accepted, then no improvement or alteration in circumstances such as those in that case could rank for the statutory percentage of increased rent, unless it was necessary in order to make the premises fit for human habitation;

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[6] [1936] 2 K.B. 605.

[7] Ibid. 623.

[8] Ibid. 624.

and then the claim would be defeated by the provisions of section 1 of the Act of 1925. I think that that case does assist the landlord, as showing that at all events the necessity or otherwise of work from the point of view of making premises fit for habitation does not necessarily govern the question whether the expenditure is expenditure on an improvement or structural alteration ranking for the increase.

I should next refer to the Irish case of *Rabbitt* v. *Grant*,[9] followed by the judge. In that case the expenditure was on work consisting of removing an earth privy and substituting for it a modern water-closet, pursuant to a sanitary notice, and the court came to the (to my mind) somewhat surprising conclusion that this was not an improvement in respect of which the increase could be claimed, because it was a repair, inasmuch as it had to be installed in order to put the premises into good and tenantable repair; that expression being apparently treated as extending to making the premises fit for human habitation according to modern sanitary standards by the installation of an entirely new and different type of convenience. Sullivan C.J. said[10]: "When "this case was first heard we were not satisfied on two points, "first, whether or not the earth privy had constituted a nuisance, "and, secondly, whether the provision of a water-closet in lieu of "the privy was necessary for the purpose of putting the premises "into good and tenantable repair. Those questions have now "been answered by the learned judge. He has found that the "earth privy was a nuisance and that the provision of a water-"closet was necessary for the purpose of putting the premises into "good and tenantable repair. Notwithstanding these findings, "Mr. Kingsmill Moore on behalf of the appellant asks us to hold "that the work done was not repairs, but an 'improvement.' "But to do so would be, in my opinion, to misinterpret the "provisions of section 8 (1) (*a*) of the Act. Although the work "done may have been an 'improvement' and a 'structural "'alteration,' it was also a 'repair.' To entitle the landlord to "an increase in rent it must be established that he has incurred "expenditure which was not expenditure on repairs. On the "facts as found in this case the expenditure was on repairs. The "question submitted for our decision should therefore be answered "in the negative." Then Murnaghan J. said[11]: "The tenant is "entitled to have the house maintained in a tenantable condition,

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[9] [1940] I.R. 323.

[10] Ibid. 333.

[11] Ibid. 334.

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" and Geoghegan J. has found that the only way of putting the " premises into a tenantable condition was by installing a water-" closet. This, although a 'structural alteration,' is in the " circumstances clearly a repair within the meaning of section 8 " of the Act." I should mention that the statutory provisions referred to in these passages were in all material respects similar to those applicable in the present case. With respect to the judges who decided the Irish case, it seems to me that they proceeded on the fallacy that all work required to put the premises into tenantable repair, or into a condition fit for human habitation, was necessarily "repairs" within the meaning of the section. That I think overlooks the fact that the definition of "repairs" in subsection (5) defines that expression as meaning "repairs " required for the purpose of keeping premises in good and tenant-" able repair," as distinct from work of any kind, whether in the nature of repairs or not, required for that purpose; and I cannot regard the circumstance that before any work was done the premises were not in tenantable repair or not fit for human habitation, and that after the work was done they were in such repair and were so fit, as necessarily concluding against a landlord the question whether under this section his expenditure, or at all events some part of it, has been expenditure on improvements or structural alterations.

The question is one, I think, which must turn very much on the facts of each particular case, and it would, in my view, be wrong for the court to regard the Irish case,[9] itself hardly reconcilable with the *Strood Estates* case,[12] as laying down any general principle which ought to be followed here. Turning again to the facts of the present case in their relation to the relevant statutory provisions, there is no doubt that the landlord has incurred expenditure, and I think he has certainly incurred expenditure on a structural alteration, that is to say, the addition of the further nine inches of concrete. He has also incurred expenditure on what is prima facie, according to the ordinary meaning of the word, an "improvement," for on the evidence he has made the house, as regards its substratum, and the system of construction of the floor and its foundations, very much better than they ever were before.

Is there, then, any sufficient reason for holding that this expenditure is to be excluded from consideration on the ground that it was expenditure on repairs? In my judgment the answer to that question is: up to a point this work, the totality of the work done, was work of repair. The tenant had a floor in the house when he went in, and clearly the house could not be said to be in good tenantable repair after the floor had become rotten. The replacement of a floor of some kind would, I think, therefore fairly come within the description of "repairs." It would be making good a defect arising from the action of the water underneath the floor which had caused the floor to rot, and to that extent, therefore, the expenditure in my view could not properly rank for the 8 per cent. increase, and it is not contended that it should so rank.

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[9] [1940] I.R. 323.

[12] [1936] 2 K.B. 605.

But the landlord did substantially more, in my view, than merely provide a new floor. He did make a structural alteration and an improvement, consisting of the laying of the additional concrete bed over the existing concrete, and that provided the house with a better substratum than it had ever had before, in the shape of a solid concrete bed on to which the new floor could be laid direct, thus getting rid of the disadvantage under which the house had laboured from the time it was built, consisting of the cavity beneath the floor, into which, under the changed conditions brought about by the rise in water level, water could find its way. Accordingly, although this is not an altogether easy case, in my view the appeal should be allowed, to the extent that the expenditure consisting of the structural alteration in the shape of the concrete work should be considered as expenditure on an improvement or structural alteration, and not an expenditure on repairs. I would allow the appeal to that extent, and assume that the parties will be able to agree the appropriate figure on that principle.

EVERSHED M.R. I am of the same opinion, and I only add some observations of my own because we are differing from the view of the judge and because of the part that the Irish case of *Rabbitt* v. *Grant* [13] played in his arriving at his conclusion. I have found the case difficult, as has my brother, and certainly it is on its facts unusual; for the question is whether the landlord can claim the benefit of section 2 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in respect of the cost incurred by him in making what is undoubtedly a structural alteration, and is undoubtedly in any ordinary sense an improvement, namely, the making of a new concrete sub-structure capable

[13] [1940] I.R. 323.

of meeting a new physical condition. I say "a new physical "condition," because it seems clear that at some stage since the house was built, and probably since the tenancy started, a change took place in the water level, and it was in order to meet that change that this alteration was made.

The judge clearly regarded himself as bound by *Rabbitt* v. *Grant*,[13] that is to say, bound in the sense that (though the case was an Irish decision) it had an authority from which he should not depart. The basis of the decision of *Rabbitt* v. *Grant*,[13] as I follow it, was that the substitution of a modern water-closet for an earth privy was a repair merely, within the meaning of the subsection, because only by that substitution could the sanitary notice that had been served be satisfied. On that basis the judge felt bound to hold in this case that the building of the new concrete bed and the putting on top of it of the new floor was the only satisfactory way (at any rate) of complying with the notice that had been served. The judge in the circumstances did not go into the question, or find whether the restoration of the floor merely could have been done without doing this much more substantial work. The difficulty that I feel in accepting the authority of *Rabbitt* v. *Grant* [13] is, first, that the second finding of fact made by Geoghegan J. seems to me to be open to objection, for I cannot regard it as a finding of fact, strictly, at all. It involved a decision, which is not a matter of fact, on the effect of the words of the Act "for the purpose of keeping the premises "in good and tenantable repair." I also feel difficulty in accepting the test, which was applied in *Rabbitt* v. *Grant*,[13] namely, that if the work done was the only way, or the only satisfactory way, of satisfying the sanitary notice, notwithstanding any changes in social conditions or in the standards of human habitation it must be a "repair" only.

As regards the case of *Strood*,[14] as my brother has pointed out, the decision clearly involves the proposition that the substitution of a modern drainage system for a more antique type of drainage could be an improvement within the section, although in the sense of *Rabbitt* v. *Grant* [13] it might be the only way of complying with the required standard of habitability; but the particular problem discussed before us was not, so far as I can see, debated in the *Strood* case,[14] and so we have to deal with the matter, I think, as res integra.

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[13] [1940] I.R. 323.

[14] [1936] 2 K.B. 605.

In the course of the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than that which had gone before. At the other end of the scale, it was also clear that work done to satisfy modern standards, although it might involve restoration, and might be said to be restoration in the *Rabbitt* v. *Grant*[13] sense, yet clearly would be an improvement. Between the two extremes, it seems to me to be largely a matter of degree, which in the ordinary case the county court judge could decide as a matter of fact, applying a common-sense man-of-the-world view. But as I have said, the judge in this case did not do that because he thought he should follow the case of *Rabbitt* v. *Grant.*[13] I think that the argument of Mr. Humphreys, though it has been attractive, comes near to involving the proposition that if an improvement is not a repair it must be unnecessary. I am not suggesting that he so argued, still less conceded, but, as my brother has pointed out, I think that quite clearly there must be improvements, in the way of structural alterations or otherwise, which are necessary, but which cannot satisfactorily be regarded as merely "repairs" within the meaning of the definition. I think, on the whole, that this is such a case, and I therefore agree that this appeal should be allowed.

HODSON L.J. Although we are differing from the judge who heard the case, I agree so fully with the conclusion at which my brother Jenkins has arrived, and with the reasons that he has given, that I, for myself, would add nothing except that I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Blundell, Baker & Co.; Copley Singleton & Billson.*

B. A. B.

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[13] [1940] I.R. 323.

1952
Feb. 1, 12.

Lord Goddard C.J., Jones, Byrne, Parker and McNair JJ.

SIMPSON *v.* PEAT.

Road Traffic—Driving without due care and attention—Collision—Justices' finding that defendant committed an error of judgment—Question of fact whether driving without due care and attention—What caused him to do so, irrelevant—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12.

The offence of driving without due care and attention, contrary to section 12 of the Road Traffic Act, 1930, may be committed by a driver whose lack of care is due to an error of judgment. If a driver has not used due care and attention—which is purely a question of fact—it is immaterial what caused him to do so.

Rex v. *Howell* (1938) 27 Cr.App.R. 5 explained.

CASE STATED by Essex justices.

The prosecutor, Arthur William Simpson, preferred an information before the justices sitting at Stansted against Roderick Mackay Peat, alleging that he, on July 9, 1951, at Stansted, Essex, had driven a motor-car on a road without due care and attention, contrary to section 12 of the Road Traffic Act, 1930.

At the hearing of the information the following facts were proved or admitted. At 6.15 p.m. on July 9, 1951, the defendant drove a motor-car at a reasonable speed in Cambridge Road, Stansted (which was a main road), in the direction of Cambridge and was approaching Chapel Hill, a minor road leading off to the right. At the same time and place a motor-cyclist was driving in the opposite direction at a reasonable speed, approaching Chapel Hill, on his left. As the two vehicles approached the defendant drove his car to the right, intending to turn into Chapel Hill and crossing the path of the motor-cyclist, and a collision occurred.

After hearing the evidence and arguments, the justices at first decided to convict the defendant. In passing sentence the chairman of the justices said that in their opinion the defendant had committed an error of judgment in thinking that he had left room for the motor-bicycle to get through. It was then contended on the part of the defendant that as the justices considered that he had committed an error of judgment he could not in law be guilty of the offence charged, and counsel on his behalf cited in support of that contention a passage in Stone's Justices' Manual (83rd ed. 1951), at p. 2160, which referred to *Rex* v. *Howell*.[1] After considering the matter, the justices dismissed the information, but stated this case.

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[1] (1938) 27 Cr.App.R. 5.

Milton for the prosecutor. The justices' original decision was perfectly proper, but they qualified it by saying that in their opinion the driving was due to an error of judgment. From being right they became wrong in law when their attention was drawn to *Rex* v. *Howell*,[1] which was irrelevant to the question they had to decide. In cases of this sort the question for the court is not whether there was an error of judgment but whether there was a driving without due care and attention. In any case, on the facts, the only possible answer was that the defendant did commit an offence against section 12 of the Road Traffic Act, 1930.

Rex v. *Howell*,[1] which is the only "driving" case in which the phrase "an error of judgment" is used, has nothing to do with a charge of driving without due care and attention, although such a finding of an error of judgment might provide an answer to a charge of dangerous driving.

The offence of driving without due care and attention is a modern one created by the Act of 1930. Before the passing of that Act, the Motor Car Act, 1903, made negligent driving an offence, which must have meant common law negligence. It appears that if the offence now in question had been committed in 1929 there would have been no answer to a charge of negligent driving. It would be remarkable if the Act of 1930, which tightened up the law and imposed heavier penalties, had the effect of excluding from liability a type of driving which was previously caught by the Act of 1903.

There is a dearth of authorities on the subject, although Lord Atkin's reference in *Andrews* v. *Director of Public Prosecutions*[2] to the degrees of negligence possible in driving is helpful; and see *McCrone* v. *Riding*.[3]

This court is not being asked to say that every person who commits an error of judgment is guilty of driving without due care and attention. The position is that an error of judgment such as a reasonable motorist might make does not constitute the offence, while an error of judgment which a reasonable motorist would not make does amount to careless driving. In other words, once there is an absence of due care and attention, a possible error of judgment has no relevance.

[1] 27 Cr.App.R. 5.
[2] [1937] A.C. 576, 583.
[3] (1938) 54 T.L.R. 328.

Although it is not directly in point, the decision in *Kay* v. *Butterworth*[4] has some value and was a case under section 12 of the Act of 1930.

Southall for the defendant. Section 12 of the Road Traffic Act, 1930, does not cover all degrees of negligence and one should hesitate before concluding that the Act makes all errors of commission or omission offences of careless driving. As regards *Andrews* v. *Director of Public Prosecutions*,[5] Lord Atkin merely said that section 12 of the Act " apparently " covered all degrees of negligence.

The precise words of section 12 are " without due care and " attention," which means that there must be two elements present before the offence is committed. It is submitted that, although a person may be negligent if he drives either without due care or without attention, both elements must be present to establish criminality under section 12: see Maxwell's Interpretation of Statutes, 9th ed., at p. 307.

A proper analysis of Lord Hewart C.J.'s judgment in *McCrone* v. *Riding*[6] gives support to the defendant's contention that a person who commits an error of judgment in his driving cannot be convicted of an offence against section 12. The test, in Lord Hewart C.J.'s words, is that a driver must pay attention to the thing he is doing, and perceiving that which he is doing he must do his best, and he must show proper care in the doing of that thing upon which he is intent.

On the facts in question, the error of judgment to which the justices referred must be taken as being a " mere " error of judgment in view of the fact that the justices were only referred to *Rex* v. *Howell*,[7] as cited in Stone's Justices' Manual (83rd ed. 1951), at p. 2160.

Milton replied.

Cur. adv. vult.

February 12. LORD GODDARD C.J., reading the judgment of the court, stated the facts and continued:—If the true effect of *Rex* v. *Howell*[7] is what the justices thought it was—and it is only fair to them to say that they did not see the full report—it is obvious that this case raises a question of great importance and would be cited constantly when charges of this nature were preferred. Accordingly it was thought right when it first came to be heard to have it re-argued before a full court of five judges.

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[4] (1945) 61 T.L.R. 452.

[5] [1937] A.C. 576, 584.

[6] 54 T.L.R. 328.

[7] 27 Cr.App.R. 5.

Rex v. *Howell* [7] is twice referred to in Stone's Justices' Manual (83rd ed. 1951), each time in relation to the offence of dangerous driving contrary to section 11 of the Road Traffic Act, 1930. At p. 2062 of the 83rd edition it is stated as authority for the proposition that, "if the driving, although dangerous in its "consequences, was due to a 'mere' error of judgment, the "defendant is entitled to be acquitted." At p. 2160 the quotation is, "he is entitled to be acquitted if the dangerous driving was a "'mere' error of judgment." The former is perhaps the more accurate citation of the two, but when the case is properly understood it will be seen that it laid down no principle of law but turned entirely on what the Court of Criminal Appeal thought a jury had meant to find by their verdict. It was a case where manslaughter was charged and, as is well known, on such a charge a jury have power to convict instead of the offence of dangerous driving created under section 11. The jury acquitted the prisoner of manslaughter and, from the discussion that then took place between the foreman and the trial judge, the Court of Criminal Appeal thought that what the jury meant by using the expression "mere error of judgment" was that, though a dangerous situation had in fact arisen, they were not prepared to hold that this was due to dangerous driving by the defendant, and accordingly they quashed the conviction. It is by no means impossible, and indeed must on occasions happen, that a situation of danger arises in which a motorist is involved but it cannot be said that he caused it by driving dangerously. That is what the court thought that the jury meant. They were certainly not laying down that an error of judgment could not amount to carelessness.

The expression "error of judgment" is not a term of art; it is in fact one of the vaguest possible description: it can be used colloquially to describe either a negligent act or one which, though mistaken, is not negligent. When one is considering section 12, the marginal note of which is "careless driving," it is in our opinion clear that a driver may not be using due care and attention although his lack of care may be due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. The question for the justices is: was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not they should convict; if, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved.

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[7] 27 Cr.App. R. 5.

The justices in the present case thought that *Rex* v. *Howell*[7] obliged them as a matter of law to dismiss the summons, but the question whether a man is driving carelessly, to use a compendious expression, raises only a question of fact. It has often been pointed out that it is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt been properly applied in deciding other cases on other sets of facts: see, for instance, *Tidy* v. *Battman*[8]; and for this purpose there can be no distinction between civil and criminal matters.

We think it would be better if reference to *Rex* v. *Howell*[9] were omitted from the books, not because we dissent from that decision, but because the case laid down no principle of law and should not be regarded as doing so. It is, in our opinion, undesirable to complicate these cases which raise only a simple question of fact by such loose and vague expressions as "error "of judgment." Whether the charge is under section 11 or section 12, the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention: but if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own; in an endeavour to avert a collision he swerves to his right—it is shown that had he swerved to the left the accident would not have happened: that is being wise after the event and, if the driver was in fact exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another and perhaps more highly skilled driver would have acted differently.

On the facts stated the court is of opinion that the justices' first decision was clearly right. The defendant was turning to his off side in a main road cutting across the line of traffic coming from the opposite direction. It was not found that the motorcyclist was driving too fast or that the respondent was confronted with a sudden emergency. It is not even found that he gave a signal, but in any case it was for him to take care that he could execute the manœuvre in safety. To use the words of the justices in their finding, he thought he had left room for traffic coming in the opposite direction to get through, when in fact he had not done so. In these circumstances there was no reason in law why he should not have been convicted, and the case must go back to the justices with a direction to convict.

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[7] 27 Cr.App.R. 5.

[8] [1934] 1 K.B. 319.

[9] 27 Cr.App.R. 5.

Appeal allowed.

Solicitors: *Arthur Morgan, Chelmsford; Gedge, Fiske & Co., for A. E. Floyd & Co., Dunmow.*

S. C.

FEYEREISEL *v.* TURNIDGE.

C. A.

March 3, 4.

Somervell, Denning and Romer L.JJ.

[1949 F. 614.]

Landlord and Tenant—Rent restriction—Possession—Camp site let with bungalow—" Land or premises let together with a dwelling-house" —Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).

In 1946 the then owner of an old chalk pit let a part of it, which was being used as a camping site, to the plaintiff, who already occupied a small bungalow on the site. By the tenancy agreement the plaintiff agreed to maintain and keep the buses, and the wooden bungalow on the site in fair condition. The present owner of the property claimed possession, which was resisted by the tenant on the ground that it was a tenancy of " land or premises let together " with a dwelling-house," within the meaning of section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and therefore within the protection of the Act. On appeal by the tenant from the order for possession given by the trial judge:—

Held, that the purpose of the Rent Restriction Acts being to protect the tenant in his home, the words " any land or premises " let together with a dwelling-house " in the second part of subsection (3) must be read as limited to cases where the land or premises was or were an adjunct to the dwelling-house. In the present case the bungalow was let as an adjunct to the camping site, and it therefore came within the last part of the subsection and was not protected by the Acts. It was not enough to find a dwelling-house in what was covered by the lease.

Decisions of the Court of Sessions in *Pender* v. *Reid* 1948 S.C. 381 and *Cargill* v. *Phillips* 1951 S.L.T. 110 approved.

Langford Property Co. Ld. v. *Batten* [1951] A.C. 223 considered and distinguished.

APPEAL from Parker J.

In November, 1946, the then owner of an old chalk pit known as the Smuggler's Leap, at Minster, Isle of Sheppey, let a part

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of it to the plaintiff, a former Czech subject, then resident in this country. The agreement, an informal document, read as follows: "I hereby grant to [the plaintiff] part of the camping site known "as the 'Smuggler's Leap' situated on the north and east side "of the road running through the ground. This part contains "three bus bodies and two trailers on ground rents and three bus "bodies on hire, also shop, shed, garage and bungalow, occupied "by himself. The tenant is to maintain and keep in fair condition buses and bungalow, replace any broken windows, and "provide two coats of good paint in the period of renting. This "is at a rental of £3 per week, the payment of £13 to be made "on the first of each month."

On July 25, 1951, in an action tried at Maidstone Assizes, the defendant, Clarence William Turnidge, counterclaimed, and was granted, an order for possession of the site and buildings. The judge said that what was really let to the plaintiff was land to enable him to carry on the business of letting out camping sites, and as it were, as an adjunct to that, he was let the bungalow on that site to enable him to live in and carry on the business. He therefore held that it was not a letting of a dwelling-house let with land, within the meaning of section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939,[1] and was not protected by the Rent Acts.

The plaintiff appealed.

G. Thesiger Q.C. and *Stuart Daniel* for plaintiff.
G. Pollock Q.C. and *Malcolm Morris* for defendant.

Somervell L.J., having stated the facts and read the letting agreement, continued:—Before I come to the legal point which has been argued I will read how the judge summed up the nature of that agreement and its subject-matter, having regard to the plan and to evidence which he heard. He says: "It is quite "true that the facts here are somewhat different" (he was there referring to a decision of the Court of Session to which I will refer later), "but I have little doubt here, having heard the plaintiff "himself, that what was really let to him was land to enable him "to carry on the business of letting out camping sites, and as it "were, as an adjunct to that, he was let the bungalow on that "site to enable him to live in and carry on the business. The "plaintiff said: 'I entered into the agreement on November 1, "'1946, with the object of sub-letting the land to campers.' If "one visualizes part of this disused chalk pit with various bus "bodies and this wooden hut upon it, it is really idle to think "of a dwelling-house being let with land, as an adjunct to that "dwelling-house. It is really a case of the letting of land on "which somebody can earn money by letting out camping sites, "and as an adjunct to that, letting him live in a wooden shed "on that site." There seems to me to be ample evidence on which the judge could summarize the effect of the letting in those words and they are consistent certainly, in my opinion, with the terms of the document itself.

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[1] Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3): "Subject to the provisions of para. (*a*) "of the last preceding subsection" [licensed and furnished premises] "application of the principal Acts, "by virtue of this section, to any "dwelling-house shall not be excluded "by reason only that part of the premises is used as a shop or office or "for business, trade or professional "purposes; and for the purposes of "the Rent and Mortgage Interest "Restrictions Acts, 1920 to 1938, as "amended by . . . this section, any "land or premises let together with a "dwelling-house shall, unless the "land or premises so let consists or "consist of agricultural land exceeding two acres in extent, be treated "as part of the dwelling-house; but, "save as aforesaid, the principal Acts "shall not, by virtue of this section, "apply to any dwelling-house let "together with land other than the "site of the dwelling-house."

The question, therefore, is whether in those circumstances the tenancy is within the Rent Act? In using the word "adjunct" the judge had in mind *Pender* v. *Reid*,[2] a decision of the Court of Session. The headnote is: "A tenant carried on business as "a coal merchant in premises which consisted of a dwelling-house "(with a small yard behind it) where the tenant and his family "lived, and a coal ree, garage and workshop which were used "exclusively for the purposes of his business. The area occupied "by the house and the small yard was less than a third of the "whole area. The whole premises had been let in the same "form to successive tenants for many years, and each tenant "had in turn carried on a coal merchant's business. *Held*, that, "since the dominant purpose of the let was for the carrying on "of the business of a coal merchant and not the provision of a "dwelling-house, the dwelling-house being merely an adjunct to "the business part of the premises, the tenancy was not protected "by the Rent Restrictions Act." In that case the Lord Justice-Clerk and Lord Mackay examined in detail the relevant provisions of section 3 (3) of the Act of 1939.

I would like to quote a sentence or two from the Lord Justice-Clerk and Lord Mackay, illustrating the argument. The Lord

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[2] 1948 S.C. 381.

Justice-Clerk said: "It is not possible to dispose of the case on "the broad ground that the mere presence of the dwelling-house "in the composite let is enough to bring the whole subjects within "the Acts."[3] In substance I think that is the effect of Mr. Thesiger's argument on the section of the Act in this case. Even where you find what on the face of it can be described as the letting of business premises, he submitted that by reason of certain words in the section of the Act of 1939 a lessee, if the subject-matter is within the rateable value, can claim the protection of the Act if, within those business premises, there is a house or part of a house which can be described as a dwelling-house. Lord Mackay, using the word which was used by the judge in the passage I have quoted, posed the question in this way: "Is "one thing"—that is, the business premises or premises other than the dwelling-house—"the adjunct of the other or the other "of the one?" Is the non-dwelling-house which is let an adjunct of the house or is the dwelling-house an adjunct of the non-dwelling-house part which is let? The judge accepted that test and applied it.

I will now turn to the relevant sections of the Act of 1939 and refer to one or two other authorities which Mr. Thesiger cited. No doubt when this legislation started, as is clear from the Act, the problem of the scope of the word "dwelling-house" was one which was realized by Parliament from the beginning. In the Act of 1915, s. 2 (2), the problem was dealt with in this way. It was enacted: "This Act shall apply to a house or part of a house "let as a separate dwelling-house where such letting does not "include any land other than the site of the dwelling-house and "a garden or other premises within the curtilage of the dwelling-"house." That apparently was found to be unduly narrow and in the Act of 1920 the problem was dealt with in this way: "For "the purposes of this Act, any land or premises let together with "a house shall, if the rateable value of the land or premises let "separately would be less than one-quarter of the rateable value "of the house, be treated as part of the house but, subject to this "provision, this Act shall not apply to a house let together with "land other than the site of the house." That provided a rateable value test which may or may not have been easy to apply but which is at any rate simple to understand.

In the Act of 1939 we find section 3 (3), and it is with this section that we are concerned, though I think the section which

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[3] 1948 S.C. 381, 385.

I have read from the Act of 1920 continues to apply to certain houses. Before I read it I will summarize the earlier subsections of section 3. Subsection (1) sets out the rateable values on the appropriate day of the properties to which the Act was to apply. It is common ground here that the rateable value of the whole of the subject-matter of the lease is within the applicable limit. Subsection (2) excepts (and this was following on earlier legislation) licensed premises, furnished premises as defined in the words which have very often come before this court, and certain council and local authorities houses. [His Lordship then read subsection (3) and continued:] It will be noted that in the latter part of that subsection there is first a reference to land or premises let together with a dwelling-house and later, following the words "save as aforesaid," to any dwelling-house let together with land. I think the Lord Justice-Clerk, or at any rate one of the learned judges in the decision to which I have referred, based his conclusion as to the construction of the section in part on that difference and indeed, on that latter part of the subsection, particularly the words following "save as aforesaid." With respect, I would have come myself to the conclusion (and I will consider later whether there is any authority which shows that this is wrong) that on the learned judge's finding the plaintiff fails in limine, because he is not the lessee of a dwelling-house and the Act is dealing with dwelling-houses.

There was a time when business premises were included, but it is common ground that it is now dealing with dwelling-houses. I think my conclusion is supported by the earlier words of this subsection, which are to be found in earlier Acts, namely, those words which say that the "application of the principal Acts, by "virtue of this section—shall not be excluded by reason only "that part of the premises is used as a shop or office or for "business, trade or professional purposes." If all you had to seek was a dwelling-house within the whole subject-matter of the lease, that provision would be unnecessary. It implies, as it seems to me, that it is not enough to find a dwelling-house in what is covered by the lease. If Mr. Thesiger is right, what would in ordinary language be described as a lease of business premises, if within the rateable value, would obtain the protection of the Act if you could find a dwelling-house within it. I think that those very words used at the beginning of this section by necessary implication negative that proposition.

Mr. Thesiger, assuming he can, as it were, get past (as I do not think he can) that initial difficulty, relies on the very wide

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words where it is said that any land or premises let together with a dwelling-house shall, unless the land or premises so let consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house. Having regard to the general language of the Acts and their plain purpose to protect and deal with dwelling-houses, and having regard to the words and the implication which, in my opinion, arises from the words earlier in the section with which I have just dealt, it seems to me quite impossible to give the words on which Mr. Thesiger relies the meaning which he seeks to put upon them. It would mean that however subordinate and minor the dwelling-house, the whole premises being within the rateable value, the protection of the Act would be obtained.

I, therefore, while agreeing with the decision in *Pender's* case,[4] in a sense, for myself, with respect, found the ratio for the decision at a slightly earlier stage in the argument. But I do not agree, as was submitted on behalf of the plaintiff here, that the construction placed on this section by the Court of Session raises any difficulty. With respect, I agree with it. I think it makes it perfectly intelligible. What you do in considering the words " any land or premises let together with a dwelling-house " is to imply the words " as an adjunct to that dwelling-house." If you get three acres of waste land, or if you get a shed or some other premises, so long as you can describe them as an adjunct to the dwelling-house, then you have only to consider the rateable value to see whether the Acts apply. I think the words after " save as " aforesaid," with respect, might have been more clearly put. I think the latter part of the section is not as clearly worded as it might be. What they are doing is negativing what I may call a construction of those, the intermediate words, which would bring everything in except premises containing more than two acres of agricultural land, and reaffirming, subject to the exceptions which I have described, the general principle to be found in the Act of 1915, that principle being that what the Acts are designed to protect is a dwelling-house.

Mr. Thesiger submits that we ought to regard what was said by the House of Lords in *Langford Property Co. Ld.* v. *Batten*[5] as negativing or throwing doubt upon the decision in *Pender's* case.[6] The problem in that case was, to my mind, quite a different one. The problem there was this. The house had originally been let without a garage. It came back into the landlord's hands and was relet with a garage. Was it with the garage the same dwelling-house as was previously let, for the purpose of fixing the standard rent? It was held that the second letting of the flat with the garage was a new letting of a new dwelling-house. In the course of the argument (and I think this is important) reliance was placed, by the respondent, on the Scottish case of *Pender* v. *Reid*,[6] and according to the report of the argument it was examined in some little detail. Lord Porter, Lord Radcliffe and Lord Oaksey referred to section 3 (3) because in this court the actual words of that section had been regarded as important and as leading to the conclusion that there was not a new letting of a new house. Lord Porter in particular sets out the various sections to which I have referred. In dealing with section 3 (3) he says[7]: "Any land (except a certain quantity of "agricultural land which is immaterial to the question at issue) "let with the dwelling-house forms part of the dwelling-house "and the only question is whether the rateable value of the "combined entity is less than or exceeds the figures prescribed "in section 3 (1) of the Act."

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[4] 1948 S.C. 381.

[5] [1951] A.C. 223.

[6] 1948 S.C. 381.

Mr. Thesiger asked us to read those words—which I do not think are intended to be anything more than a statement of the words to be found in the section—as negativing the conclusion in *Pender* v. *Reid*.[8] There are other passages on which he relies in the same sense. I think there is a sentence in Lord Radcliffe's opinion which supports the general view which has led me to the conclusion to which I have come, when he says[9]: "The basic "thing therefore which is protected is the structure forming a "house or part of a house and the site that it occupies." I think it would be quite wrong to regard the citing and summarizing of those sections for the purpose of the quite different problem which their Lordships had to consider, as indicating any view on the decision in *Pender* v. *Reid*.[10] In fact, I would have said that if there was any conclusion to be drawn it was that the noble and learned Lords, at any rate on the face of it, see nothing to hesitate about or to doubt in that decision. The case having been cited in argument, if they had felt that what they were saying was inconsistent with it, they would have said that it should be treated as overruled. I think probably if they had felt that it was in any way relevant and had felt a doubt about

[6] 1948 S.C. 381.
[7] [1951] A.C. 233.
[8] 1948 S.C. 381.
[9] [1951] A.C. 238.
[10] 1948 S.C. 381.

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it they would have expressed that doubt. Therefore, so far as one can gather anything from the *Langford Property* case,[11] I would have been inclined to think that the noble and learned Lords saw no reason to think that there was anything wrong with *Pender* v. *Reid*.[12]

One or two other cases were referred to. There was a decision of Hallett J. in *Thompstone* v. *Simpson*,[13] applying *Pender* v. *Reid*,[12] and we were referred to *Vickery* v. *Martin*.[14] I need not, I think, trouble to refer to that case in any detail. It was a case where in applying what are the earlier words of subsection (3), namely, that a "dwelling-house shall not be excluded by reason "only that part of the premises is used as a shop or office," it was sought to cut them down by saying that it must be a non-substantial part which is used as a shop or office. The court negatived that view. There is one sentence again, though I do not want to place too much weight upon it, in Lord Greene's judgment, which again I think bears out the general principle which I have tried to apply. He says[15]: "The words of "section 3 (3) says that, once a house is a dwelling-house within "the meaning of the Act, it is not sufficient to exclude it from "the operation of the Act merely to show that part of the "premises is used as a shop or office or for business, trade or "professional purposes." That is what you have got to find, in the first instance I think, namely, that the letting is a letting of a dwelling-house within the meaning of the Act. For the reasons which I have tried to give I think on the learned judge's finding there was not here a letting of a dwelling-house within the meaning of the Act, and the appeal should be dismissed.

DENNING L.J. This is the familiar contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation of it. It is not a very promising case in which to ask the court to give it a literal interpretation. It arises in this way: a landlord let to a tenant a two-roomed bungalow at a rent of 14s. a week. It was let furnished. The furniture was only worth £5 or £6, but it was all the furniture there was in the bungalow. The judge said, I think quite rightly, that the furniture was sufficiently substantial to make the letting of the bungalow a furnished letting not protected by the Rent Acts. Sometime later a whole camping site was added to the letting.

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[11] [1951] A.C. 223.
[12] 1948 S.C. 381.
[13] [1952] 1 All E.R. 431.
[14] [1944] K.B. 679.
[15] Ibid. 683.

The landlord let to the tenant, not only the furnished bungalow, but also the camping site with several bus bodies, sheds, and so forth, at an inclusive rent of £3 a week. The camping site was a good business proposition, being let in the summer to people for their holidays. The tenant says that, by reason of the addition of the camping site, he is now protected by the Rent Acts, whereas previously he was not. There must be something wrong about that: but where is the flaw?

Mr. Thesiger says that this case falls precisely within the second part of section 3 (3) of the Act of 1937. His argument runs in this way: The bungalow was a dwelling-house. The camping site was "land or premises let together with the "dwelling-house." It was not agricultural land. It is, therefore, to be treated, for the purposes of the Acts, as part of the house. The whole is under £75 rateable value. The whole is therefore protected. The furniture in the bungalow forms so small a proportion of the whole rent that it does not deprive the tenant of the protection of the Act. Thus the second part of section 3 (3) is satisfied: and the third part does not apply, because that only applies where the second part does not.

I agree that, if the words of section 3 (3) be taken in their literal meaning, they do lead to the result contended for by Mr. Thesiger: and so do the words used in some of the speeches in *Langford Property Co.* v. *Batten.*[16] But it is a mistake to take a few words out of an Act of Parliament and to stick to the letter of them. Every word of the Act must be read in the light of the Act as a whole. The guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home. The Acts apply to dwelling-houses, not to business premises. This is shown by the opening words of section 12 (2) of the Act of 1920, which applies the Acts to houses "let as a separate dwelling" and section 3 of the Act of 1939 which applies the Acts to "dwelling-houses." Those are the governing words. The remaining words of those sections are concerned with marginal cases, such as a house where the front rooms are used as a shop; and a house let with a field; and so forth.

We are here concerned with the problem of a house let together with land or other premises. The Act of 1920 solved the problem by making protection depend on the relative rateable values. If the house was three times as valuable as the rest, then the whole was protected: but if not, then none of it was protected. The Act of 1939 discarded this test, owing no doubt to changes in the rating law. For instance, in between the two Acts, agricultural land had become exempted from rates and had presumably no rateable value. In 1939, therefore, some new test had to be found for a house let with agricultural land. The legislature solved it by saying that if the agricultural land was less than two acres, the whole was protected: but if it was more, then none was protected. The position about agricultural land is therefore clear enough.

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[16] [1951] A.C. 223.

But what is the position when other land or premises (not agricultural land) is let together with a dwelling-house? In respect of such land or premises, the legislature in 1939 discarded the rateable value test and put nothing in its place. They left the courts to grapple with two contradictory provisions. Under the second part of section 3 (3) such land or premises is to be treated as part of the dwelling-house: but under the third part, the Acts are not to apply to the house or the land. In order to resolve this contradiction we must, I think, read the second part as limited to cases where the land or premises is an adjunct to the house. This means that the words "as an adjunct to the "dwelling-house" have to be read into that part of the section. I acknowledge that this involves a departure from the literal interpretation, but it does, I think, carry out the intention of Parliament: because it fulfils the fundamental conception that the Acts are intended to protect dwelling-houses, not business premises.

The decisions of the Court of Session in *Pender* v. *Reid* [17] and *Cargill* v. *Phillips* [18] are directly in point. English judges have followed those decisions and I think we should do the same. They are fully in line with the recent decisions of this court, such as *Court* v. *Robinson*,[19] where it was held that premises let as a social club were not protected by the Acts even though the steward lived there. Cases such as *Vickery* v. *Martin* [20] and *Kitchen's Trustee* v. *Madders* [21] are distinguishable because they turned on the first part of section 3 (3) and not on the second and third parts. In those cases there was one house let and used as a single entity for dwelling purposes. It was not let together with other land or premises.

[17] 1948 S.C. 381.

[18] 1951 S.L.T. 110.

[19] [1951] 2 K.B. 60.

[20] [1944] K.B. 679.

[21] [1950] Ch. 134.

The effect of section 3 (3) is therefore as follows:—First, a dwelling-house does not cease to be protected simply because a substantial part of it is used for business purposes; secondly, a dwelling-house does not cease to be protected simply because it is let with something else which is an adjunct to it, such as a garden, a yard, a garage or a paddock; but thirdly, a dwelling-house is not protected if it is let with more than two acres of agricultural land; or if something else, such as a factory or a business, is the main object of the letting and the dwelling-house is merely an adjunct to it. This case comes within the third category. The camping site was the main object of the letting and the bungalow was merely an adjunct to it. The premises are not protected by the Acts. I agree that the appeal should be dismissed.

Romer L.J. I also agree, and there is not very much I desire to add. I agree with Mr. Pollock when he suggests that this case is really one substantially of fact. When one looks at the description of the property in the agreement and at the agreed plan A, which was put in at the trial, one finds that the subject-matter of this letting was a piece of land applied to commercial purposes and having upon it a bungalow or shed for the convenience of the owner or occupier. In those circumstances, the judge was very well justified in expressing the view which he did express, that it is really a case of the letting of land on which somebody can earn money by letting out camp sites and, as an adjunct to that letting, the occupier lives in a wooden shed on that site. I agree with my Lord that, taking the facts as they have been established, this shed or bungalow cannot properly be regarded as a dwelling-house for the purposes of the Act at all.

But assuming that one has to look to the provisions of subsection (3) of section 3 of the Act of 1939, for my part it appears to me that the case is precisely within the last part of that subsection, because it is a case where there is a dwelling-house let together with land other than the site of the dwelling-house. I regard that part of the subsection as constituting the general law applicable to composite lets. Anybody who wants to get out of that general rule must show that they are brought within the excepting words "save as aforesaid." When one looks to the words which precede that provision one finds the middle part of the subsection which deals with "any land or premises let "together with a dwelling-house." It seems to me that both historically and on construction that middle part is dealing, and dealing only, with cases where the primary subject-matter of the letting is a dwelling-house and, as is common with dwelling-houses in this country, a small piece of land goes with the dwelling-house and is an adjunct thereto. It is to save cases of that kind that the middle part of this subsection was introduced.

That view of the matter is entirely consistent with what Lord Radcliffe said on the subject of the legislation in *Langford Property Co. Ld.* v. *Batten*,[22] to which my Lord drew attention, where he said: "The basic thing therefore which is protected is "the structure forming a house or part of a house and the site "that it occupies." He went on to say: "If something beyond "that is also to come within the protection of the Act" (meaning thereby the Act of 1920, s. 12) "it must be brought within "it by the operation of some positive enactment to be found "between the beginning and the end of subsection (2)." Applying that test it seems to me that it is wrong to say that the present case is one brought within the operation of the middle part of section 3 (3) of the Act of 1939 and is, therefore, taken out of the words which are precisely apt, as I think, and which are to be found in the general rule at the end.

I would only add that if any further ground be wanting for rejecting the submission which was put before us by Mr. Thesiger, it is to be found in this, that on the construction which he was asking us to adopt, although the final part of subsection (3) was plainly intended to be the generally operative provision relating to composite dwellings there would be practically no cases to which that general rule would apply, having regard to the width of the interpretation which was sought to be put upon the excepted provisions which are to be found in the middle of subsection (3). I accordingly agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer, for Robert C. Wilson, Margate; Kingsford, Dorman & Co., for Girling, Wilson & Bailey, Margate.*

A. W. G.

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[22] [1951] A.C. 223, 238.

BURGESS *v.* JARVIS AND SEVENOAKS RURAL DISTRICT COUNCIL.

[1951 B. 3710.]

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Feb. 11, 19.

Somervell and Denning L.JJ. and Roxburgh J.

Town and Country Planning—Enforcement notice under town planning scheme—Notice not stating period at expiration of which it came into effect—No opportunity given for appealing against demolition order—Invalidity of notice—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (2), (3).

A rural district council, as the local planning authority, served enforcement notices on the owner and occupiers of sixteen houses under section 23 of the Town and Country Planning Act, 1947. The notices required the owner to demolish the houses and restore the land to its condition before the houses were erected, "within "5 years after the date of the service of this notice." It did not state the period at the expiration of which the notice would take effect, as required by subsection (3) of section 23:—

Held, that the notice was invalid because no date was specified for its coming into effect and it afforded no opportunity to any person who was aggrieved to challenge and appeal against it.

Appeal from Parker J.

The plaintiff Burgess was the tenant of one of a block of 16 houses owned by the defendant Jarvis and built by him in 1936. The houses, all of which were occupied, had been erected in contravention of an interim town planning scheme then in existence, but no proceedings were taken against the defendant for contravention of that scheme until the Town and Country Planning Act, 1947, was passed. On May 19, 1951, the Sevenoaks Rural District Council served, under section 23 [1] of the Act, an enforcement

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[1] Town and Country Planning Act, 1947, s. 23 (1): "If it appears to the "local planning authority that any "development of land has been carried "out after the appointed day without "the grant of permission required in "that behalf under this Part of this "Act, or that any conditions subject to "which such permission was granted "in respect of any development have "not been complied with, then, subject to any directions given by the "Minister, the local planning authority may within four years of such "development being carried out, if "they consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section."

Subs. (2): "Any notice served under "this section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission as aforesaid or, as the case may be, the "matters in respect of which it is "alleged that any such conditions as "aforesaid have not been complied "with, and may require such steps as "may be specified in the notice to be "taken within such period as may be

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notice on the defendant Jarvis, requiring him to " demolish the " aforementioned 16 houses and restore the land to its condition " before the aforementioned operations took place within 5 years " after the date of the service of this notice." The notice was also served on each of the tenants.

The defendant owner did not challenge the enforcement notice, but notified the tenants of the termination of their tenancies and of his intention to demolish the houses before the end of that year. In those circumstances the plaintiff issued the writ in the present action against the defendant, claiming an injunction to restrain him from demolishing the house which the plaintiff was occupying under a weekly tenancy protected by the Rent Restriction Acts. That action came before Parker J. in chambers, and the judge granted an injunction to restrain the defendant from demolishing the house " unless and until an order is made under section 289 " of the Public Health Act, 1936, as applied to section 24 of the " Town and Country Planning Act, 1947, by reg. 8 of the Town " and Country Planning (General) Regulations, 1948."

The defendant appealed.

On the hearing of the appeal counsel for the plaintiff was permitted to raise a preliminary point, namely, that the enforcement

" so specified for restoring the land to " its condition before the development " took place, or for securing compliance " with the conditions, as the case may " be; and in particular any such notice " may, for the purpose aforesaid, " require the demolition or alteration " of any buildings or works, the dis- " continuance of any use of land, or " the carrying out on land of any " building or other operations."

Subs. (3): " Subject to the provisions " of the next following subsection, an " enforcement notice shall take effect " at the expiration of such period (not " being less than twenty-eight days " after the service thereof) as may be " specified therein: Provided that— " (*a*) if within the period aforesaid " an application is made to the local " planning authority under this Part " of this Act for permission for the " retention on the land of any build- " ings or works, or for the continuance " of any use of the land, to which the " enforcement notice relates, the notice " shall be of no effect pending the final " determination of that application, " and if such permission as aforesaid " is granted on that application, the " notice shall not take effect; (*b*) if " within the period aforesaid an appeal " is made to the court under the " following provisions of this section " by a person on whom the enforce- " ment notice was served, the notice " shall be of no effect pending the " final determination or withdrawal of " the appeal."

Subs. (4) provides for appeals.

S. 75 (1): " Where any works on " land existing at the appointed day " were carried out . . . in contraven- " tion of previous planning control, " then, subject to the provisions of this " section, the provisions of Part III " of this Act with respect to enforce- " ment notices shall apply in relation " thereto as they apply in relation to " development carried out after the " appointed day without the grant of " permission in that behalf under the " said Part III."

notice was invalid, in that it did not state the period at the expiration of which the notice took effect, but only the period within which the specified steps for restoring the land had to be taken. This contention was accepted by the defendant landlord.

By agreement, and at the suggestion of the court, the Sevenoaks Rural District Council were then joined as defendants, and the plaintiff was given leave to amend his writ, so as to claim a declaration against both defendants that the enforcement notice was invalid.

B. J. M. MacKenna Q.C. and *G. R. King Anningson* for the plaintiff.

P. M. O'Connor for the first defendant.

G. A. Thesiger Q.C. and *H. J. Baxter* for the Sevenoaks Rural District Council.

Somervell L.J. This appeal raises an important point, but as I have come to a clear conclusion upon it, and it can be simply stated, I do not think any useful purpose will be served by reserving my judgment. The matter arises in this way: The original plaintiff was the tenant, and the original defendant was the landlord, of one of a block of 16 houses built by the defendant in 1936. The houses were put up in contravention of the then town planning scheme. We are not concerned with the precise state of the law before the Town and Country Planning Act of 1947, on the construction of which this appeal depends; but, as I understand it, at that time a man who failed, as the defendant did, to apply for interim permission to put up houses, otherwise than in accordance with an interim scheme, did so at his own risk. If, subsequently, a final scheme became operative and what he had done contravened that scheme, action might be taken against him. That was the position then, and no proceedings were, or could be, taken until the Act of 1947 was passed. That Act gave power to issue what are called enforcement notices in respect of development before the Act, but in contravention of then existing, though interim, schemes. So far as these enforcement notices related to development before the appointed day under the Town and Country Planning Act, 1947, there was a period of limitation, and they could only be issued within three years of the appointed day. The appointed day was July 1, 1948, and therefore if, as is argued in this case, the enforcement notices issued were bad, it may be that that is a matter which could not now be put right. That is why I said this is an important issue.

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[His Lordship stated the facts, read the material sections of the Town and Country Planning Act, 1947, and continued:] Notwithstanding the closely reasoned submission of Mr. Thesiger for the local authority, I have no doubt myself at all that these sections of the Act mean something different from that for which the local authority contends, and I will state first what I think these sections plainly mean and contemplate. In my opinion there are two periods, each of which has to be specified in the notice. The first in point of time, though it comes later in the section, is the period under subsection (3), that is, the period at the expiration of which the enforcement notice takes effect. The second, which arises under subsection (2), is the period, also to be specified, within which the specified steps for restoring the land, and so on, have to be taken; and I think it is plain that the second of those periods in point of time does not start until the first has expired and the notice has taken effect. That seems to me the plain meaning of the words, and if one considers them in their context the reason for what I have called the first period is obvious. The first period is the period during which the notice can be challenged; permission can be asked for, and any person aggrieved can appeal. The owner may want to appeal; the occupier may want to appeal, or they both may want to appeal, and one, therefore, would expect a period for appeal when the notice was ineffective. It may never become effective at all. The specified period must be not less than 28 days; it may be prolonged if there is an appeal under the provisions which I have read, and the date of taking effect is suspended. If the appeal is dismissed, then the notice takes effect subject to a power in the proviso at the end of subsection (4) enabling the court to say that it shall not come into force until a further date, not being later than 28 days.

That being, as I think, the general effect of these provisions, I turn to the notice. After recitals which are not disputed we come to the point upon which the argument arises: "Now there-"fore the Rural District Council of Sevenoaks do hereby give you "notice in pursuance of their powers as Local Planning Authority "under sections 23, 24 and 75 of the Town and Country Planning "Act, 1947, to:—Demolish the aforementioned sixteen houses "and restore the land to its condition before the aforementioned "operations took place within five years after the date of the "service of this notice."

It will be seen that only one period is specified. In my view, as I have said, the section of the Act requires two periods to be specified. Mr. Thesiger's argument (to which I hope I shall do justice) is this: he submits that the Act does not require two periods; he says that the sense in which I have used the words "take effect" is wrong; that "take effect" in this section, when you look at it as a whole and read it with section 24, means the moment of time after which sanctions can be taken. He said that in the case of this notice no offence is committed by anyone until after the expiration of five years, and that that, therefore, is the date when the notice takes effect, and that it is wrong to treat the taking effect as on the expiration of a preliminary period for the purpose of appeal. On that view it follows that, as he submits, an appeal could be brought, or permission sought, under the subsection which I have read, at any time up to the end of the five years.

Having given what I think is the natural meaning of these words, I will give one or two more reasons why I find it impossible to accept that argument. One reason why the period mentioned in subsection (2) is not the same as the period in subsection (3) is this: The period in subsection (3) is qualified by the words "not "being less than twenty-eight days." If there was only one period one would expect that qualification to appear in the earlier subsection. If the period intended to be specified under subsection (3) was the same as the period to be specified under subsection (2), under ordinary drafting principles it would be referred to in subsection (3) by reference, so as to make it clear that there was only one period to be specified. Also, I think, one would need very strong words to produce the result to which Mr. Thesiger's argument leads, for another reason. It is obvious that the period of five years is the period within which the demolition is to take place. I agree there is no sanction unless there has been a failure to do it within that period. In a case where both an owner and an occupier are involved, one gets a most anomalous state of affairs if the right of appeal, say, by the occupier, remains available right up to the end of the period within which the landlord is called on to demolish, because when the house was half-down, on this construction there would still be notionally a right of appeal. For these reasons, in addition to what, after all, is the guide in these matters, namely, what do the words in their ordinary significance mean, I think that submission fails. I think section 23 requires two periods; in particular it requires the period to be specified at the expiration of which the notice is to take effect; and it is, in my view, at the end of that period, which is an uncertain date, because of the

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possibility of appeal, that the period which Mr. Thesiger referred to conveniently as the period for compliance should begin. As this notice does not comply with those provisions I think it is invalid and inoperative under the section.

When we allowed the local authority to be added the writ was amended, and the plaintiff claimed a declaration against both defendants that the enforcement notice, dated May 19, 1951, and served on the plaintiff and the first-named defendant by the local authority, the second-named defendant, is invalid, in that the said notice does not specify any period at the expiration of which the said notice shall take effect as required by section 23 (3) of the Town and Country Planning Act, 1947, and, alternatively, in that the said notice specifies only one period as that at the expiration of which the said notice shall take effect, and as that within which the said notice shall be complied with, contrary to the requirements of section 23 (2) and (3) of the said Act.

For these reasons I think the order made by the judge must be varied, and the appeal allowed in the respect which I have indicated.

This preliminary point was argued first because it was common ground that if it succeeded none of the other questions would arise. We have, therefore, not heard any argument on, and have expressed no opinion on, any point dealt with by the judge below.

Denning L.J. I agree. In my opinion section 23 (3) of the 1947 Act clearly imports that an enforcement notice must allow at least 28 days after service before it takes effect; it must not be so framed as to take effect at once. The reason is so as to give the owner or occupier time to apply to the planning authority for permission to retain the house, or to appeal to the magistrates. He has 28 days to make his application, or to appeal, and, if he does so, then the notice does not take effect until the matter is determined.

The question is whether this notice satisfies the requirements of the Act. Mr. Thesiger argued that it only takes effect at the end of five years after service. It was served on May 19, 1951, and he argues that it only takes effect on May 19, 1956. I cannot take that view. The notice requires the owner to demolish 16 houses "within five years after the date of service of this notice." A similar notice was served on each of the occupiers of the houses. Looking at the wording of the notice, it is quite clear it took effect at some time before the expiration of five years, because the owner was required to act within that time; and if he was to demolish the houses within the five years he would clearly have to start work some weeks or months beforehand. If the notice takes effect before the end of five years, when does it take effect? I think the only possible date is the date on which it was served; because, unless it took effect on the service of the notice, the owner would not have the benefit of the full five years allowed to him to do the work. The result is, therefore, that this notice took effect at once. It did not allow the occupier the minimum of 28 days before it took effect. It ought to have specified from which date it took effect, and it did not specify any period. It was, therefore, invalid.

ROXBURGH J. I agree that this enforcement notice is invalid, because it does not specify the date on which it is to take effect. Mr. Thesiger, in his able argument, submitted, if I understood it correctly, that if the notice specified a period within which the work required was to be done, then no further date need be specified, because the notice took effect at the moment of the expiry of the period within which the work was to be done. I must confess such a conclusion seems to me impossible, if the work required to be done is other than a metaphysical operation, and, of course, this Act is not concerned with metaphysical operations.

Appeal allowed. Order of Parker J. varied.
Leave to appeal to House of Lords.

Solicitors: *Hewitt, Woollacott & Chown; Light & Fulton, for W. H. House & Son, Sevenoaks; Knocker & Foskett, Sevenoaks.*

A. W. G.

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Feb. 18, 19.

Somervell and Denning L.JJ. and Roxburgh J.

BARCLAYS BANK LD. *v.* BECK.

[1951 B. 1907.]

Banking—Agricultural credit—Customer's account overdrawn—Charge under Agricultural Credits Act, 1928, *executed in favour of bank—Discharge of charge—Account still in debit—Merger—Agricultural Credits Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 43), *s.* 5 (1), (5).

In November, 1949, the defendant farmers, whose account with the plaintiff bank was overdrawn, executed in favour of the bank a fixed and floating charge, under the Agricultural Credits Act, 1928, on all or any of the livestock and other agricultural assets belonging to them. In the following year, when the bank was pressing for payment, the defendants sold the freehold of their farm and out of the purchase money paid to the bank a sum of £4,000 in respect of the livestock and agricultural assets and obtained the discharge of the charge. The defendants' running account was, however, still in debit and the bank, in the present proceedings, claimed to recover a sum of £582 19s. 0d. The defendants contested the claim on the ground that the right of the bank to recover the overdraft had been merged in the bank's right under the charge and therefore all the defendants' liabilities had been discharged.

By clause 1 of the charge the defendants covenanted "to pay "to the bank the balance of all moneys now or hereafter owing ". . . under any account current or other account with the bank, "and all other moneys and liabilities now or hereafter due or to "become due . . . to the bank in respect of any advance made or "to be made by the bank to the farmer or upon any account or in "any manner whatever . . .":—

Held, that the merger of a simple contract debt into a specialty debt depended on the intention of the parties, which was to be gathered from the documents they had signed; that clause 1 of the charge clearly indicated that there was to be no merger, and that the contractual rights of the bank as against its customer were preserved.

Per Denning L.J.: The agricultural charge was only collateral security for the running account, and when that collateral security was discharged and handed over the indebtedness on simple contract remained, except in so far as it had been satisfied by payment. The doctrine of merger, if it applied at all, would at the most only apply to the indebtedness which existed at the date when the covenant was taken and the charge given.

Observations of Maule J. in *Price* v. *Moulton* (1851) 10 C.B. 561, 573 that a man cannot have a remedy by covenant and by assumpsit for the same debt, having regard to what was said by the Judicial Committee of the Privy Council in *Commissioner of Stamps* v. *Hope* [1891] A.C. 476 disapproved.

Decision of Barry J. affirmed.

APPEAL from Barry J.

From 1948 onwards the defendants, the Baron and Baroness Beck, farmed a holding known as Holtsmere End Farm near St. Alban's. They had a joint account at the St. Alban's branch of the plaintiffs' bank, and were jointly and severally liable under the ordinary form of contract for any overdraft which might arise. By 1949 the account had become considerably overdrawn, and on November 2 of that year the defendants executed in favour of the bank a fixed and floating charge under the Agricultural Credits Act, 1928, Part II of which is intended "to facilitate the "borrowing of money on the security of farming stock and other "agricultural assets, and for purposes connected therewith."[1]

In the latter part of 1950, when the bank was pressing the defendants, and had appointed a receiver to exercise their right under the charge, the defendants' account was said to be in debit a small amount over £4,000. The defendants were minded to sell the freehold of the farm, including the livestock, growing crops and so forth, which were charged to the bank. They were anxious that there should not be a forced auction of the property, and on December 21 their solicitors wrote to the bank's solicitors stating that the person who was going to purchase the farm was prepared to pay £28,000, and added: "We also confirm that "we have our clients' irrevocable instructions to authorize the "purchaser to pay your clients, Barclays Bank, direct on the "completion of the purchase of the farm the sum of £4,000 in "respect of the live and dead stock and tenant rights at Holtsmere "End Farm against your clients' discharge of their agricultural "charge."

The £4,000 was paid to the receiver, but after deducting certain charges made by the receiver and other expenses there remained an overdraft of £582 19s. 9d., and that sum was claimed by the bank in the present proceedings.

The defendants contended that the right of the bank to claim the overdraft on the ordinary relationship of banker and customer had been merged in their right under the covenant contained in the charge, and that that deed and all liabilities under it having been discharged, including the obligation to pay the overdraft, the bank had no claim.

Barry J. found in favour of the bank for £582 19s. 0d., and the defendants appealed.

J. Hobson for the defendants.

Percy Lamb Q.C. and *John Bradburn* for the plaintiffs.

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[1] Agricultural Credits Act, 1928, s. 5 (1): "It shall be lawful for a "farmer as defined by this Act by "instrument in writing to create in "favour of a bank as so defined a "charge . . . on all or any of the "farming stock and other agricultural assets belonging to him as "security for sums advanced or to "be advanced to him or paid or to "be paid on his behalf under any "guarantee by the bank and interest, "commission and charges thereon."

Subs. (5): "The principal sum "secured by an agricultural charge "may be either a specified amount, "or a fluctuating amount advanced "on current account not exceeding at "any one time such amount (if any) "as may be specified in the charge, "and in the latter case the charge "shall not be deemed to be redeemed "by reason only of the current "account having ceased to be in "debit."

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The argument for the defendants sufficiently appears from the judgments. Counsel for the plaintiff contended that merger depended on the intention of the parties as disclosed by the documents they had signed, and that the charge negatived any such intention.

SOMERVELL L.J. stated the facts and read section 5 (1) and (5) of the Agricultural Credits Act, 1928, and continued:—The defence put forward before the judge and before us is based on the principle that if a higher security, for example a bond or covenant, is given to secure an existing simple contract debt, it operates in law as a merger, and the remedy is solely under the higher security. What is said is this: If you look at this charge you will find in it a covenant to pay the overdraft. The right of the bank, therefore, to claim the overdraft on the ordinary relationship of banker and customer has been merged in that right under the covenant contained in this charge, and as a result of the letters written by the solicitors of the parties, and the agreement to which I will come, that deed and all liabilities arising under it have been discharged in toto, including the obligation to pay the overdraft, and in those circumstances, therefore, the bank has no claim.

That depends, in my view, on the construction of the deed. We were referred to a number of cases, none, I think, directly in point. In *Price* v. *Moulton* [2] the general principle was discussed on a pleading point, and the opinion was there expressed by one of the judges that merger operated irrespective of the intention of the parties. That statement was doubted by the Judicial Committee of the Privy Council in 1891 in *Commissioner of Stamps* v. *Hope*.[3] The issue in that case does not matter, but what was said was: "The reported language of the court"—that is, in *Price* v. *Moulton* [2]—"in some places indeed seems to imply a "larger and broader meaning; but, if that is to be understood as "importing that a merger of a simple contract debt in a debt of "a higher nature is effected by law, merely by the existence of "an identical covenant, and notwithstanding the plain intention "of the parties to the contrary, that is a proposition which their "Lordships would hesitate to assent to." [4]

That opinion was in accordance with what Bayley J. had said in *Twopenny & Boys* v. *Young*,[5] where he said: ". . . where

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[2] (1851) 10 C.B. 561.

[3] [1891] A.C. 476.

[4] Ibid. 483.

[5] (1824) 3 B. & C. 208, 211.

"there is that in the instrument which shows that the parties "intended the original security to remain in force, the new one "has not the effect of extinguishing it. . . ." With that in mind, I will approach the construction of the covenant which is relied on here. In doing so I think one necessarily has to have in mind the purpose and the general terms of the Act under which this charge was given and the general nature of the transaction as shown by that Act, with which we are concerned. It is the very familiar transaction of a customer of a bank giving a security in respect of an overdraft. The words of the Act, in section 5 (5), indicate, as one would expect, that it covers not only an advance of a specified sum which might be made ad hoc under some special terms against a charge, but also a charge which may be given in respect of a fluctuating amount advanced on current account.

Clause 1 of the covenant, or the part of that clause which is material, reads: "The farmer"—and by definition that includes both defendants and it relates to the joint account—"hereby "covenants with Barclays Bank Limited (hereinafter called 'the "'bank') that the farmer will on demand or upon the death of "the farmer without demand pay to the bank the balance of all "moneys now or hereafter owing by the farmer under any "account current or other account with the bank and all other "moneys and liabilities now or hereafter due or to become due "from the farmer to the bank in respect of any advance made or "to be made by the bank to the farmer or upon any account or "in any manner whatever . . .", and then it goes on to say whether owing by the farmer to the bank as principal or surety and whether alone or jointly.

The simplest case of merger is, of course, where a simple contract debt is sued for and is merged in the judgment. That case is quite plain, but the prima facie case which I think the words which are used in relation to this doctrine contemplate, is where you get a debt for a specified amount due under a simple contract, and in respect of which a bond is entered into between the same parties and no surety is brought in. It may be that the creditor gives time, but gets the advantage of getting a bond, or he may get some other advantage, as in one of the cases, such as payment on a certain day with interest. There, again, it is plain that the whole basis of that is that it is in substitution for the simple contract debt. It would make nonsense of the transaction if, having entered into that arrangement, possibly giving time, the man the next day could sue upon the simple contract debt.

The question here, as it seems to me, is whether the ordinary contractual position as between banker and customer, which would be usual in respect of advances apart from this clause, is merged in and destroyed by being replaced by what appears in clause 1. In my opinion that clause, so far from doing that, indicates that the position is the contrary. I would rely in particular on the expression "all other moneys and liabilities now "or hereafter due or to become due." It is covering future advances. Those advances may be on any terms that the customer and the bank agree. The customer may persuade the bank to agree to grant an advance which shall only be repayable on six months' notice. It refers to moneys now or hereafter owing by the parties, and I think the form, therefore, is what I myself should have expected from the attendant circumstances. The relationship of bank and customer continues; a charge is given; and clause 1 sets out that the farmer remains liable to pay whatever is due and owing to the bank according to the terms agreed between them, apart from this document, as and when it becomes due and owing. The obligation to pay does not arise under the charge, but under one or more separate transactions with the bank.

It may be—I do not know, nor is it necessary to decide—that unless some such clause was there someone might have suggested that the bank, having accepted a charge in respect of the overdraft, had precluded themselves from saying they could sue on demand. If what was charged really exceeded the amount of the overdraft, it would seem rather unreasonable if the whole repayment was demanded the next day, and no doubt that is not done; but clause 1 seems to me to make it clear that, notwithstanding the acceptance of the charge, the contractual rights of the bank as against their customer are preserved. For these reasons it seems to me the argument that there has been a merger here fails.

The judge below was inclined to take that view, but went on to decide that even if he was wrong about that the effect of the later letters was not to discharge the bank's rights, assuming they were the only rights, to sue for the overdraft under clause 1, but simply to release the property charged. Having come to the conclusion which I have stated, I do not propose to discuss that point, because it seems to me one gets into a very artificial position. It is, as a matter of fact, plain from the correspondence that neither party at that stage thought that what was described as the discharge of the agricultural charge completely freed the defendants from any liability. The defendants disputed the plaintiff's right to deduct the receiver's expenses and the solicitors' charges, but they did not dispute their liability to pay whatever was the amount of the overdraft above £4,000. It therefore seems to me a rather artificial point, and it is not necessary for the decision of this case to discuss whether a particular phrase meant this or that on the basis that the charge meant something which neither party thought it did.

A last point raised by Mr. Hobson was that in any case he could challenge the receiver's expenses, and I think the solicitors' charges. It is quite plain that the deed did make provision for those charges, and even if one regards it as completely discharged by what happened in December, those charges, as it seems to me, had accrued at the time of the alleged discharge. A further point that Mr. Hobson desired to argue here was whether the basis of the calculation of the receiver's charges was correct. He told us that point had really not been debated below on the lines on which he wished to submit it here, and, in those circumstances, we thought, it being a very subsidiary point as to quantum and it not having been raised below, it should not be raised in this court.

For these reasons I think that this appeal fails and should be dismissed.

Denning L.J. I agree. The merger of a simple contract debt into a specialty debt depends undoubtedly on the intention of the parties, and their intention is to be gathered from the documents they have signed. In an ordinary case where a defendant, who owes an existing simple contract debt, gives security for payment of it, by means of a covenant under seal and a charge on his property, then the simple contract debt is merged in the specialty unless there is an express provision to the contrary. That appears from *Price* v. *Moulton*,[6] as explained in the case of *Commissioner of Stamps* v. *Hope*.[7] But a running account with a bank stands on a different footing. When security is given for payment of amounts due, or to become due, on a running account, the doctrine of merger, if it applies at all, would at the most only apply to the indebtedness which existed at the date when the covenant was taken and the charge given. The reason is because merger can only apply to existing debts. Future debts do not merge; they take their colour from the

[6] 10 C.B. 561.

[7] [1891] A.C. 476.

circumstances in which they arise. They are then either specialty debts or simple contract debts; and, as they start, so they go on. If they are created under and by virtue of a deed, then they are specialty debts from their creation; but if they are created by a simple contract outside a deed, then they remain simple contract debts even though there is a deed in existence which gives collateral security for them. The distinction is clearly shown by considering the difference between a mortgage debt to a building society and a charge to a bank to secure a running account. The mortgage debt to a building society is created under and by virtue of a deed, and is a specialty debt from its creation; but a future debt on a running account is a debt created by parol, and it remains a simple contract debt, even though the customer has previously given a charge to secure it, which includes a covenant under seal. The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment.

We are not concerned here with the debt which existed when the charge was given, because that existing debt was paid off during the time the account was running and was replaced by future debts. I would like to say, however, that if the deed was given as collateral security in regard to the future debts, as I think it clearly was, then it was also collateral security for the debt which existed when the charge was given, for there is no reason for supposing that the parties intended to draw a distinction between them. In my opinion, therefore, the agricultural charge was only collateral security for the running account. When this collateral security was discharged and handed over, the indebtedness on simple contract remained except in so far as it had been satisfied by payment.

I would only add that in *Price* v. *Moulton*[8] Maule J. is reported to have said: " . . . a man cannot have a remedy by " covenant and by assumpsit for the same debt; the two are " wholly incompatible and cannot co-exist. . . ." Having regard to what was said by the Judicial Committee of the Privy Council in the case of *Commissioner of Stamps* v. *Hope*,[9] I think it must be taken that that statement is incorrect. It does not apply when the covenant is given by way of collateral security.

I agree that the appeal should be dismissed.

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[8] 10 C.B. 561, 573.

[9] [1891] A.C. 476.

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ROXBURGH J. I agree. In such a case as this, which relates to an instrument of charge, the question of merger or no merger is a question of intention as revealed by that instrument, and I also agree that the instrument here in question indicates that there was to be no merger.

Appeal dismissed.

Solicitors: *Glover & Co.; Sharpe, Pritchard & Co., for Longmores, Hertford.*

A. W. G.

BURNELL *v.* DOWNHAM MARKET URBAN DISTRICT COUNCIL.

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Jan. 17, 18, 21; *Feb.* 22.

Evershed M.R., Jenkins and Hodson L.JJ.

Rating—Open space—Rateable occupation—Land conveyed to local authority as open space—Used by sports clubs—Exclusion of public for short periods—Payment occasionally required for admission—Occupation by public—Whether local authority in beneficial occupation—Open Spaces Act, 1906 (6 *Edw.* 7, *c.* 25), *ss.* 10, 15.

By a conveyance dated December 31, 1946 a seven acre field purchased by public subscription was conveyed to an urban district council to hold "upon trust for the perpetual use thereof by the "public for the purposes of exercise and recreation pursuant to "the provisions of the Open Spaces Act, 1906." The field had been laid out with a football and cricket pitch, two hard tennis courts had been made and a wooden pavilion erected. The council had let the tennis courts to local clubs for their exclusive use for certain hours after 6 p.m. and it had entered into an agreement with the local football and cricket federation under which in consideration of the payment of £85 the council granted to the federation the right to use the cricket or football pitches on certain days with the right to close the field on a limited number of agreed days and on those days to make a charge for admission. The closure lasted on those days for one hour and a quarter and for a total period of 40 hours in any year. The council's expenditure on the field amounted in the year to £427 17s. 6d. and its receipts to £189 18s. 6d. the deficit being paid out of the rates. The Lands Tribunal held that the council were not in beneficial occupation of the field for rating purposes:—

Held, (1) that the council was bound for the foreseeable future to continue to hold the field on the trusts declared by the deed of 1946. The powers of sale conferred by section 29 of the Settled

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Land Act, 1925, could not be regarded as doing more than provide appropriate conveyancing machinery if and when the local authority came to dispose of the land. Section 42 of the Town and Country Planning Act, 1947 did no more than apply the modern method of bringing about changes in the use of land vested in local authorities in substitution for the older method of special amending legislation. These statutory powers did not prevent the field from being held for the "perpetual" use of the public. (2) That the conveyance of 1946 operated by virtue of the Open Spaces Act, 1906, to impose on the land the obligations prescribed by that Act of allowing it to be used by the public for purposes of recreation. (3) That if the matter were judged solely by reference to the legal effect of the statutory restrictions imposed on the field by the Act of 1906, the real occupiers were the public and the sole interest of the local authority was as custodians and trustees for the public and this case was indistinguishable from *Lambeth Overseers* v. *London County Council* [1897] A.C. 625 (the *Brockwell Park* case), and the local authority was not in rateable occupation. (4) That the actual user of the land did not involve such a departure from the obligation to allow the public free and unrestricted use of it as to justify the conclusion that the council had in fact assumed the character of rateable occupiers. The right of the public to "free and unrestricted user" did not involve the proposition that any member of the public could at all times gain access to the field without payment. The question was one of degree to be determined by the Lands Tribunal. The tribunal was entitled to conclude that the limited exclusion of the public resulting from the council's agreement with the local clubs was ancillary to their management of the field as an open space within the meaning of the Open Spaces Act, 1906. The council accordingly was not rateable.

If it were conceded both that the council could not be regarded as mere trustees for the public, and that they were not bound to hold and manage the land for the purposes of recreation by the public, the restrictions affecting the land must then be regarded as so qualified that the court was not satisfied that no tenant would pay for the privilege of a tenancy of the field and that accordingly its rateable value was nil, and the court expressed no concluded opinion whether on such assumptions the council were in beneficial occupation.

Lambeth Overseers v. *London County Council* [1897] A.C. 625 followed.

London Playing Fields Society v. *Essex South-West Area Assessment Committee* (1930) 144 L.T. 233 distinguished.

Liverpool Corporation v. *West Derby Assessment Committee* [1908] 2 K.B. 647 considered.

Appeal from the Lands Tribunal.

At the end of the war of 1939–45 a public meeting was held at which it was resolved to purchase a recreation ground for the use of the public. £6,000 was raised with the aid of a grant from the Ministry of Education and applied in purchasing a field of some seven acres at Downham Market and laying it out and equipping it as a playing field. By a conveyance dated December 31, 1946, this field was conveyed to the Downham Market Urban District Council, and it was thereby provided that they " will hold " the premises hereby conveyed upon the trusts following, that is " to say, upon trust for the perpetual use thereof by the public " for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906."[1] The conveyance was recorded in the books of the Charity Commissioners for England and Wales.

The Lands Tribunal in the case stated found that the field was laid out and used as follows: At the western side there was a football pitch; during the winter season the pitch was roped off, becoming, in the summer, part of the cricket out-field: there was a cricket table of special turf, which was roped off when it was not being used: there was a separate concrete practice wicket, and in the north-eastern corner a wooden pavilion 36 ft. by 17 ft., consisting of changing rooms and a tea room; near to it was a gravel car park which could be used free of charge by persons using the playing-field: in the northern part of the field there were two hard tennis courts wired off, and there was also a putting green, which, however, was falling into disuse: finally, at the southern end of the field, separated from the rest of the field by an evergreen fence, was the garden of remembrance, less than half an acre in extent, where members of the public could sit quietly.

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[1] Open Spaces Act, 1906, s. 10: " A local authority who have acquired " any estate or interest in or control " over any space or burial ground " under this Act shall, subject to any " conditions under which the estate, " interest, or control was so acquired: " (*a*) Hold and administer the open " space or burial ground in trust to " allow, and with a view to, the enjoyment thereof by the public as an " open space within the meaning of " this Act and under proper control " and regulation and for no other purpose; and (*b*) maintain and keep " the open space or burial ground in " a good and decent state, and may " inclose it or keep it inclosed with " proper railings and gates, . . . and " do all such works and things and " employ such officers and servants as " may be requisite for the purposes " aforesaid or any of them."

S. 15: " (1) A local authority may, " with reference to any open space or " burial ground in or over which they " have acquired any estate, interest, " or control under this Act, make byelaws for the regulation thereof, and " of the days and times of admission " thereto, and for the preservation of " order and prevention of nuisances " therein, and may by such byelaws " impose penalties recoverable summarily for the infringement thereof, " and provide for the removal of any " person infringing any byelaw by any " officer of the local authority or police " constable."

As regarded management: the tennis courts were let by the season to nine clubs, each having the exclusive use of a court for so many hours after 6 p.m. during the season. At all other times the courts were available to the public at a rate of 2s. 6d. per hour for each court.

The council by agreement dated February 6, 1951, made with The Federation of Downham Town Football and Cricket Clubs, granted to the federation permission to use the cricket and football pitches and the dressing-rooms in the pavilion for the purpose of organized matches according to a fixture list submitted to and approved by the council during a term of two and a half years from February 1, 1951, the federation paying for such privilege a sum of £85 per annum. The agreement provided by paragraph 3: "The federation may close the entrance to the field on such dates "as are set out in the list of fixtures for the purpose of making a "charge for admission to the field and may also make collections "on the field on these dates, the closing of the entrance to be "subject, however, to granting rights of access to users of the "tennis courts, putting green and any other amenities provided "by the council on the field." The practical effect of this clause was found in the case stated to be that: "Access is open to the "public at all times subject to the exercise by the Federation "of the rights contained in paragraph 3 of the agreement of "February 6, 1951. In practice, the entrance is closed during "the first half of football matches but not during cricket matches. "The closure lasts for about one and a quarter hours for each "football match, a total of about 40 hours in any year."

It was finally found in the case that a groundsman was permanently employed by the council and paid by the council; that the expenditure on the field for the year ended March 31, 1950, amounted to £427 17s. 6d. (including the groundsman's wages) and that the income for the same year amounted to £189 18s. 6d., the excess being paid out of the rates—" but the intention is to "restrict the amount of the excess to what can be covered by a "rate of 4d. or 5d. in the £."

The local valuation officer entered the field in the valuation list with a gross value of £10 and a rateable value of £9. The local valuation court on the council's appeal directed the deletion of the assessment. The Lands Tribunal affirmed that decision, holding that the council, in the circumstances of the present ownership and use of the land, was not in beneficial occupation of the land and was not liable to any rate.

The valuation officer appealed.

Sir Arthur Comyns Carr Q.C., *Maurice Lyell* and *Patrick Browne* for the valuation officer. The tribunal was wrong in holding that the council is not in beneficial occupation of this field. Beneficial occupation does not depend on a power to make a profit. An occupation is of value if it serves the purpose of the occupier: *Great Central Railway Co.* v. *Banbury Union*[2]; *Port of London Authority* v. *Orsett Union Assessment Committee*.[3] For rating purposes it is the actual user which counts. A squatter with no legal title is rateable: *Manchester Corporation* v. *Chorlton Union Assessment Committee*[4]; *Trustees of Sir John Soane's Museum* v. *St. Giles Vestry*.[5]

The case is not governed by the decision in *Lambeth Overseers* v. *London County Council*,[6] known as the *Brockwell Park* case. In that case the London County Council had under a Private Act of Parliament purchased a park. That Act imposed a duty on the council to hold the park for the perpetual use by the public for exercise and recreation. The principle of that case does not apply to land purchased by a local authority where the trusts created are not statutory. [They referred to: *Liverpool Corporation* v. *West Derby Assessment Committee*[7]; *Carnegie Dunfermline Trustees* v. *Dunfermline Assessor*[8]; *London Playing Fields Society* v. *Essex South-West Area Assessment Committee*[9]; *Yorkshire North Riding County Valuation Committee* v. *Redcar Corporation*[10]; *Mitcham Golf Course Trustees* v. *Ereaut*.[11]]

It is submitted that the result of the authorities is that for the principle laid down in the *Brockwell Park* case[12] to apply two conditions have to be satisfied. First, the public must have access without payment to every part of the land with but trifling exceptions. That condition is not fulfilled here. The leases to the clubs and federation give to some persons for a substantial period the exclusive use of parts of the field. It is contended that the club members are not the public for this purpose. Secondly, there must be a perpetual statutory dedication. This field is not the subject of any statutory dedication. The purchase was not under the Open Spaces Act, 1906. The statutory powers of sale and leasing conferred by section 29 of the Settled Land Act,

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[2] [1909] A.C. 78.
[3] [1920] A.C. 273.
[4] (1899) 15 T.L.R. 327.
[5] (1900) 83 L.T. 248.
[6] [1897] A.C. 625.
[7] [1908] 2 K.B. 647.
[8] 1909 S.C. 678.
[9] (1930) 144 L.T. 233.
[10] [1943] K.B. 114.
[11] [1937] 3 All E.R. 450.
[12] [1897] A.C. 625.

1925, on persons holding land on charitable trusts combined with the provisions of section 42 of the Town and Country Planning Act, 1947, destroy the perpetual character of the trusts and take the case out of the principle of the *Brockwell Park* case.[12]

Lastly, it is submitted that the council is in beneficial occupation. In fact it cannot be denied that the occupation is of some value.

Michael Rowe Q.C. and *D. Lowe* for the council. It is submitted that this case falls within the principle of the *Brockwell Park* case.[12] The council acquired this field as trustees and custodians for the public. Consequently the public are the occupants and the council is not rateable. Secondly, one of the uses of land authorized by the Open Spaces Act, 1906, is for the playing of organized games. That appears from the fact that there is an express prohibition of the playing of games on burial grounds. Organized games are recreation. There must be some control of the playing of games in order to make the best use of the land.

This field is dedicated by the conveyance of 1946 to the use of the public in "perpetuity." The fact that the council as trustees have certain statutory powers of sale does not prevent the dedication being in perpetuity. Section 42 of the Town and Country Planning Act, 1947, does not affect the matter. If the submission that this land is dedicated to the public is wrong, it is further submitted that such dedication is not necessary in order to bring the principle of the *Brockwell Park* case[12] into operation. Land leased for 999 years would be within the principle. The *London Playing Fields* case[13] was quite a different case. There the user was pursuant to a covenant which could have been released. It is enough if it is shown that the land is dedicated to the use of the public for the year in question.

Here the council was not in beneficial occupation. Any moneys received in respect of the use of this land has to be applied by the council on the property.

Prima facie when land is held under the Open Spaces Act, 1906, the public is the occupier. If the position depends on the actual user of the land, the agreements which the council entered into with the tennis clubs and the football and cricket federation does not prevent the user being by the public. The Act vests the management of the land in the council, and what the council has done was in course of the proper management of the land. Nothing the council has done has been adverse to the public.

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[12] [1897] A.C. 625.

[13] 144 L.T. 233.

If the public are not the occupiers, it is submitted that having regard to the terms of the deed of 1946 the council is not in beneficial occupation. No tenant would pay a rent for this field who had to observe the terms of the deed of 1946.

Sir Arthur Comyns Carr Q.C. in reply. The appellant's main point is that having regard to the actual user of this field, it is not within the principle of the *Brockwell Park* case.[12] The basis of that decision was that the public as a whole could not be excluded from the park. The manner in which this field is managed results in the public as a whole being excluded from substantial parts of it. Both Lord Halsbury L.C. and Lord Herschell in the *Brockwell Park* case[12] based their conclusion on the fact that the public had free and uninterrupted use of the park. Here that is not the case. The council is in fact managing this field for the benefit of the members of a number of clubs. The result is that the council is rateable.

Cur. adv. vult.

February 22. EVERSHED M.R. read the judgment of the court, and after stating the facts he continued:—The question for determination may be briefly and conveniently stated by reference to the decision of the House of Lords in the well-known *Brockwell Park* case[12]—*Lambeth Overseers* v. *London County Council.* In that case the park in question had been acquired by the respondents, the London County Council, pursuant to powers in a local Act which laid upon them the duty, after acquisition, to hold the park and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation. The House held that the council was not rateable in respect of it. At the beginning of his opinion Lord Halsbury L.C. said[13]: "I do not "think there is here a rateable occupation by anybody. The "'public' is not a rateable occupier." He referred to the private Act "which cast upon them" (that is, the London County Council) "the perpetual obligation to maintain and "preserve it, when purchased, as a park for the perpetual use "of the public for exercise and recreation." At the end of his speech Lord Halsbury L.C. summed the matter up in these words[14]: "Once it has been found, as in this case, that the "occupation cannot as a matter of law be a beneficial occupation,

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[12] [1897] A.C. 625.

[13] Ibid. 629.

[14] Ibid. 630.

"there is an end of the question. I say as a matter of law, "because that it does not give a beneficial occupation as matter "of fact is nothing to the purpose. Here there is no possibility "of beneficial occupation to the county council; they are incap- "able by law of using it for any profitable purpose; they must "allow the public the free and unrestricted use of it." Lord Herschell's opinion was to the same effect[15]: "I am not satisfied "that the county council are occupiers of this park for rating "purposes, though the legal possession is, no doubt, vested in "them. They seem to me to be merely custodians or trustees to "hold it and manage it for the use of the public."

The question before this court is whether on its facts the present case falls within the principle of the *Brockwell Park* case[16] and, in particular, the statement of that principle which we have quoted from the speeches of Lord Halsbury L.C. and Lord Herschell.

We have not so far referred to the terms of the Open Spaces Act, 1906, pursuant to the provisions of which, as will be recalled, the council declared themselves trustees of the field for its perpetual use by the public for the purpose of exercise and recreation. The relevant sections are sections 7, 9, 10 and 15, together with the definition of "open space" in section 20. Section 7 contains a power for corporations and other persons to convey to any local authority any land for the purpose of its being preserved as an open space for the enjoyment of the public under the Act. Section 9 contains corresponding power for local authorities to acquire open spaces, and to undertake their care, management and control. By section 10 it is provided that a local authority who has acquired any estate or interest in an open space shall hold and administer the open space "in trust "to allow, and with a view to, the enjoyment thereof by the "public as an open space within the meaning of this Act and "under proper control and regulation and for no other purpose"; and shall also maintain and keep the open space in a good and decent state. By section 15 a local authority may, with reference to any open space, make by-laws for the regulation thereof and of the days and times of admission thereto and for the preservation of order and prevention of nuisances therein. Finally, by section 20, the expression "open space" is defined to mean any land "whether enclosed or not, on which there are no build- "ings or of which not more than one-twentieth part is covered

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[15] [1897] A.C. 625, 632.

[16] Ibid. 625.

"with buildings, and the whole or the remainder of which is laid "out as a garden or is used for purposes of recreation, or lies "waste and unoccupied."

Before stating our conclusion on the main argument presented to us (which involves some consideration of the scope and effect of the *Brockwell Park* case[16] and which, as we think, turns very largely on the effect of the manner in which the field is in fact used and managed by the council) it is convenient first to deal with two other grounds on which, according to Sir Arthur Comyns Carr, the present case is distinguishable from that of the *Brockwell Park* case.[14]

The first turns on the use by Lord Halsbury L.C. of the word "perpetual." In the *Brockwell Park* case[16] the London County Council was enjoined by the relevant local Act (as already noticed) to hold such land and every part thereof as a park and preserve the same for the "perpetual" use thereof by the public for exercise and recreation. It does not appear that there was any power under the local Act or otherwise for the London County Council in any circumstances to dispose of the park or otherwise change its use, and there is no doubt that Lord Halsbury L.C., in his speech, expressly referred to and relied on this obligation of permanence. We find it, however, impossible to think that Lord Halsbury L.C. intended to lay it down that this characteristic of permanence, as an obligation for all eternity, was essential to the conclusion that the London County Council was not rateable in respect of the park. As appears in subsequent cases, it has always been recognized that any statutory power or duty is liable to be altered by Parliament itself by some later Act, general or special. So much, of course, Sir Arthur conceded. But he contended, nevertheless, that the general powers of disposition conferred on local authorities by modern statutes in respect of all land held by them is something altogether different in kind from the possibility of change by future legislation and have, as it were, swept away any characteristic of permanence in cases otherwise comparable with the *Brockwell Park* case[16] whatever may have been the sense in which Lord Halsbury L.C. used the word "perpetual." Though he referred to the Local Government Act, 1933, Sir Arthur did not rely on this statute. He did, however, rely on the tenant for life's powers of sale and other disposition under the Settled Land Act, 1925, vested in local authorities by virtue of section 29 of

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[16] [1897] A.C. 625.

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that Act; and he relied more particularly on the wide terms of section 42 of the Town and Country Planning Act, 1947. Having regard, however, to the general tenor and purpose of the Town and Country Planning Act, 1947, and to the safeguards introduced by subsection (2) of section 42 of that Act, the general powers in that Act cannot, in our judgment, fairly be regarded for present purposes as doing more than applying the modern method of bringing about changes in the use of land vested in local authorities and dedicated in their hands to purposes of the kind here in question, in substitution for the older method of special amending legislation. Nor can the Settled Land Act powers be regarded, in our judgment, for present purposes as doing more than providing appropriate conveyancing machinery if and when a local authority, in the proper exercise of its duties, comes to dispose of its land. For, in any case, such powers are powers to be exercised by the local authority as trustees and can therefore only be exercised, if at all, in conformity with the trusts on which it may hold the relevant land. Notwithstanding these modern statutory powers, therefore, we feel no doubt that the council cannot now be regarded as otherwise than bound for the foreseeable future to continue to hold this field on the trusts declared in respect of it under the deed of 1946. Certainly we think there is no ground on which it can be said (as was said by Lord Hewart C.J. in *London Playing Fields Society* v. *Essex South-West Area Assessment Committee*[17] hereafter noted) that the present trusts and uses affecting the field might be merely transitory.

The second point is of the same character, and rests on the fact that in the present case the trusts declared, albeit by reference to the Open Spaces Act, 1906, are declared and established only in and by the terms of a voluntary deed. Sir Arthur Comyns Carr did not suggest that any distinction could be drawn between a case where a public body acquired or held land for public uses pursuant to a statutory duty so to do and a case in which such a body held land similarly under a mere statutory power. He contended, however, that the principle of the *Brockwell Park* case[16] has never been and should not now be extended to a case where, as here, the trusts arose out of, and only out of, the deed of the parties to it; and in support of this proposition he relied on *London Playing Fields Society* v. *Essex South-West Area Assessment Committee*[17] and the Scottish case of

[16] [1897] A.C. 625.

[17] 144 L.T. 233.

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Carnegie Dunfermline Trustees v. *Dunfermline Assessor.*[18] The present case is, we think, entirely different from the *London Playing Fields* case,[17] where the obligations of the society as to the user of the land rested only on its covenant with the other parties to the deed, which those other parties could at any time release. In the present case the council declared themselves trustees in perpetuity, and they could not by any means, otherwise than by a statute or by the exercise of statutory power, be effectively released from their obligations under the trust, either by the other party to the deed of conveyance or by any other person or combination of persons. It is true that in the *Carnegie Dunfermline Trustees* case [18] a comparable trust created by deed as distinct from statute was held on this ground not to exclude liability to assessment. But we are by no means satisfied that this Scottish decision should be followed in England, as we have difficulty in appreciating why the reasoning in the *Brockwell Park* case [16] should not be equally applicable to the trustees of land held for like purposes under a valid charitable trust irrevocably created by deed. We find it unnecessary, however, to express any concluded opinion as to the validity or scope of the distinction sought to be drawn by Sir Arthur; for it is, in our view, plain that the trusts here in question are in effect statutory trusts, inasmuch as the conveyance in the present case operated by virtue of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed by that Act to which we have already referred—in short, the duty of allowing it to be used by the public for the purposes of recreation.

We turn, then, to the main question in the case. As appears from the passages from the opinions of Lord Halsbury L.C. and Lord Herschell, which we have quoted, the main ground of the decision of the House of Lords in the *Brockwell Park* case [16] was clearly, in our judgment, that, having regard to the restriction imposed on the land by the special Act and to the facts of the case, the real occupiers were the public and the sole interest of the London County Council was as "custodians or trustees" for the public. We have already stated our view that the present case is not distinguishable from the *Brockwell Park* case [16] on the ground of any impermanence in the uses and trusts now affecting the playing field in question. Nor in our opinion are the restrictions imposed by the Open Spaces Act, 1906, materially different from those imposed by the special Act in the *Brockwell Park* case [16] and there held to have the effect of excluding the council from rateable occupation. If, therefore, the matter is judged solely by reference to the terms and legal effect of the statutory restrictions, this case is in effect concluded in favour of the council by the *Brockwell Park* case.[16]

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[16] [1897] A.C. 625.

[17] 144 L.T. 233.

[18] 1909 S.C. 678.

It remains, however, to consider whether the facts regarding the actual user of the land in the present case involve such a departure from the obligation succinctly described by Lord Halsbury in the phrase "they must allow the public free and "unrestricted use of it" as to justify the conclusion that whatever their legal obligations in the matter may be, the council have in fact assumed the character of rateable occupiers of the land in question.

It is not suggested that "free and unrestricted use" by the public means that the public, that is, any member of the community who chooses so to do, must be free to go upon the land at any time of the day or night. A right for a local authority, or for any other body charged with the duty of holding and managing an open space or park for the public use, to close such a place at night, for example, must clearly be ancillary to, if not indeed essential for, good regulation. The terms of the Open Spaces Act, 1906, themselves indicate that a right of closure as such is not inconsistent with dedication for public recreation. In the *Brockwell Park* case [16] itself there were certain portions of the land from which the public was necessarily excluded—those portions occupied by a keeper's lodge, the bandstand, and refreshment building. But those exclusions were the manifestations of the duty and exercise of management, and their total area compared with that of the whole park was of course negligible. In the later case of *Liverpool Corporation* v. *West Derby Assessment Committee* [19] a similar question of rateability arose as regards the plaintiff corporation's occupation of a park of 89 acres. The plaintiff corporation were by their local Act and bylaws made thereunder empowered to close the park for not more than seven days in any year, and, on these occasions, to make charges for admission. The power had in fact been exercised from time to time, though rarely, for the purpose of fetes in aid of a local hospital. On these occasions the plaintiff corporation did not themselves make any charge for admission, but the persons who were permitted to use the park did so. It was argued that these facts distinguished the Liverpool case from that of the London County Council: but this court found no difficulty in concluding that the Liverpool corporation's power of exclusion and its exercise were merely ancillary to the dedication of the land as a public park: see *per* Fletcher Moulton L.J.

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[16] [1897] A.C. 625.

[19] [1908] 2 K.B. 647, 667.

In the present case it is said that, whatever be in strictness the trusts and duties imposed on the council, they are in fact so managing the field that the public is to a substantial extent excluded from its use for the purposes of recreation. If he may perhaps have deliberately over-stated it, yet Sir Arthur put his case effectively and not unfairly when he said that the council was using the field to all intents and purposes for the benefit of a number of athletic clubs. And if that summary of the situation is justified, then, according to the argument, the case falls outside the scope of the *Brockwell Park* [20] decision and becomes analogous to the *London Playing Fields* [21] decision already mentioned, and to the case of *The North Riding of Yorkshire County Valuation Committee* v. *Redcar Corporation*,[22] where it was held that a local authority, who owned a considerable area near the foreshore and used and managed it substantially as an amusement park, were rateable in respect of their occupation of it.

It cannot, we think, be denied that the incidents of the council's management of the field in question involve a somewhat greater degree of exclusion of its free and unrestricted use by the public than was the case of the park occupied by the Liverpool Corporation. Still, in our judgment, the question is one of degree and therefore a matter of fact to be determined, and, in the absence of some misdirection, conclusively determined, by the Lands Tribunal. We accept Mr. Rowe's submission that in modern times provision for some form of organized athletics, the spectacle of which may be enjoyed by the public, is not inconsistent with a duty to provide for recreation by the public: and in the present case the sum total of the extent to which members of the public are excluded from free entry into the field forms a minute fraction of the total hours of daytime throughout the year. As we have already indicated, we do not think the use by Lord Halsbury L.C. of the words [23] "free and "unrestricted use" involve the proposition that any member of the public can at all times, when the field or open space is not wholly closed in accordance with proper regulation and good management, gain access to the field at his will without payment. Put another way, we think that the tribunal was entitled, on the facts of this case, to conclude that such limited exclusion as the council's arrangements with the cricket and football clubs and the tennis clubs involved is properly ancillary to their management of the field as an open space within the meaning of the Open Spaces Act, 1906. We will assume in Sir Arthur's favour that the matter should be decided by reference to the user in fact rather than by reference to the trusts imposed on the council. But, we think that the same conclusion results. We add, however, that, in our judgment, the arrangements which the council have made do not involve any departure from strict compliance with the trusts to which they are subject.

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[20] [1897] A.C. 625.

[21] 144 L.T. 233.

[22] [1943] K.B. 114.

[23] [1897] A.C. 625, 631.

There remains one further question. In the course of their speeches in the *Brockwell Park* case [23] both Lord Halsbury L.C. and Lord Herschell undoubtedly expressed themselves as basing their conclusions not only upon their view that the London County Council were mere trustees and custodians for the public but also (applying a recognized test for rateability) on the fact that, having regard to the statutory restrictions attaching to Brockwell Park, no tenant would in any circumstances give anything at all for the privilege of an occupation which could not provide the capacity to earn more than the rent which such a tenant would be called upon to pay. And in the present case it was argued, alternatively, on behalf of the council, that even though the council could not be regarded as mere custodians for the public, still, in the circumstances, no tenant could ever be found to pay a penny piece for the privilege of a tenancy of the field in question, and accordingly that its rateable value must be nil. This argument is but an expansion of the forceful phrase—"struck with sterility"—of Bowen L.J. in *West Bromwich School Board* v. *West Bromwich Overseers*.[24] For our part, we agree with the view expressed by Darling J. in the *Liverpool Corporation* case,[25] that, however attractive and apposite such language may have been on the occasion that it was used, it is somewhat dangerous to rely on it, at least without a careful consideration of its true significance. In the *Brockwell Park* case,[23] having regard to the terms of the relevant statute, we think that Lord Halsbury L.C. and Lord Herschell, in referring to the fact that no tenant would pay anything for the right of

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[23] [1897] A.C. 625, 631.

[24] (1884) 13 Q.B.D. 929, 943.

[25] [1908] 2 K.B. 647, 656.

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occupying the land, were really expressing in a different way the same point involved in their conclusion that, in truth, the public were the occupiers: for the absolute duty to use and manage the park for the "free and unrestricted use of the public" attached in whatever hands the estate or interest in the land was vested. If, however, it is once conceded in the present case that the council are not mere trustees or custodians for the public, that they are not bound to hold and manage the field for the purposes of recreation by the public, it seems to follow that the restrictions affecting the land must be regarded as so qualified that we are not for ourselves satisfied that it could be fairly said "no one "would pay a penny piece for the privilege of becoming its "tenant." It must now be taken as well settled to be no answer to a claim to rateability that land is held on terms such that its owner cannot in fact derive any pecuniary benefit thereout. We prefer, therefore, to express no view upon this branch of the council's argument, but to rest our conclusion upon the view we have earlier expressed, namely, that on the facts of the present case the tribunal was entitled to conclude, as it did, that the council were mere trustees or custodians for the public and, accordingly, that the real occupiers for present purposes are the public themselves.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Inland Revenue; Reed, Wayman & Walton, Downham Market.*

B. A. B.

PEGLER *v.* CRAVEN.

[Plaint No. 1951 G. 116]

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Evershed M.R., Jenkins and Hodson L.JJ.

Landlord and Tenant—Tenancy of shop and living accommodation—Shop carried on by company and tenant managing director—Shares held by tenant and his wife, relations and friends—Expiring tenancy—Application by tenant for new tenancy—Refusal on ground tenant not "occupier of shop"—Leasehold Property (Temporary Provisions) Act, 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2), *s.* 12 (3) (*b*) *and s.* 20 (1).

The plaintiff was the tenant under a lease of premises comprising living accommodation and a shop. The business of the shop was carried on by a company to which the landlord had assigned the goodwill at the request of the tenant; but the company paid no rent to the tenant and the shares of the company were held by the tenant and his wife, some relations and friends and he was the managing director. He held alone rather less than half the shares of the company.

The tenant after receiving notice from the landlord determining the lease on February 1, 1952, applied for the grant of a new lease under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1) which enables "the occupier of a shop under a "tenancy to apply to the court for . . . a new tenancy where . . . "the expiring tenancy would come to an end . . . by the expiration of a notice to quit given by the landlord whether before or "after the commencement of this Act."

Held (reversing the decision of Judge Sir Gerald Hurst K.C.), that the plaintiff was not the occupier of the shop seeing that the business of the shop was the business of the company and was not the tenant's business. He was not therefore entitled to the grant of a new lease under the Act.

Clift v. *Taylor* [1948] 2 K.B. 394 distinguished.

Quaere, whether the position would be different in such a case if the tenant were beneficial owner of all or substantially all the shares issued by the company.

APPEAL from Judge Sir Gerald Hurst K.C., sitting at East Grinstead county court on November 27, 1951.

The plaintiff was the tenant under a lease dated July 1, 1947, of premises comprising living accommodation and a shop, known as Wilmington Bookshop at East Grinstead, for the term of 21 years terminable on either side at the end of 5, 10 or 15 years. The tenancy had been granted by the defendant, Mrs. Lydia Craven, and she gave notice terminating the tenancy on February 1, 1952.

The actual business of the shop was carried on by a company to which the defendant had assigned the goodwill at the request of the tenant. The shares of the company were held by the tenant and his wife (who together held the majority of the shares) and some relations and friends. The tenant was the managing director. The residential part of the premises was occupied by the tenant and his wife.

The tenant applied for the grant of a new tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1).[1]

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[1] The Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) The provisions of this part "of this Act shall have effect for "enabling the occupier of a shop "under a tenancy to which this "section applies (hereinafter referred "to as 'the expiring tenancy') to "apply to the court for, and subject "to the provisions of this Act to

The county court judge granted the application, holding the tenant to be the occupier of the shop within the Act.

The defendant appealed.

A. E. Holdsworth for the defendant. Under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1), the applicant for a new lease must be " the occupier of a shop " as well as the tenant. Here the tenant is not the occupier of the shop, for the business of the shop was being carried on by the company to which the goodwill of the business had been assigned. The judge held that the tenant was also the occupier of the shop, on the ground that the company was the tenant's licensee, paying no rent for the shop. But the tenant had to be the occupier of the shop within the meaning of the Act, and by section 10 (2) (*b*) the shop and the living accommodation had to be occupied "wholly or mainly by the tenant or by a person who is employed "by the tenant for the purposes of the retail trade or business "carried on in the shop." This clearly envisages that the business being carried on is the tenant's business, and that is clearly not the case here. Section 12 confirms this contention.

T. M. Eastham for the plaintiff. This is a case of great importance applicable to many other cases. It is physically possible to be the occupier of a shop although the shop is being carried on by a licensee. That the company is a mere licensee is shown by the fact that the company pays no rent. In this sense the company is carrying on business in the shop on behalf of the tenant. The tenant has at all times been in possession of the shop by his licensee and therefore the occupier of the shop. This view is supported by *Paterson* v. *Gas, Light and Coke Co.*,[2] *Clift* v. *Taylor*[3] and *Butlins Ld.* v. *Fytche*.[4]

"obtain, the grant of a new tenancy "where . . . the expiring tenancy "would come to an end immediately "before the date of the commencement of this Act or within the "period of two years beginning with "that date, and would so come to an "end by effluxion of time or by the "expiration of a notice to quit given "by the landlord, whether before or "after the commencement of this Act.

"(2) This section applies to a "tenancy, the subject of which . . . "(*b*) consists of a shop and of living "accommodation occupied wholly or "mainly by the tenant or by a person "who is employed by the tenant for "the purposes of the retail trade or "business carried on in the shop."

S. 20: "(1) In this Act the following expressions have the meanings "hereby assigned to them respectively, "that is to say:—. . . 'shop' means "premises occupied wholly for business "purposes, and so occupied wholly or "mainly for the purposes of a retail "trade or business: . . . 'the tenant,' "in relation to a tenancy, means the "person for the time being entitled to "the tenancy."

[2] [1896] 2 Ch. 476.

[3] [1948] 2 K.B. 394.

[4] [1948] 1 All E.R. 737.

[EVERSHED M.R. I could understand this argument if the company were in truth a mere alter ego.]

That is very nearly the position; the tenant and his wife hold the majority of the shares of the company and the tenant has at all times been the managing director and so carrying on the business. Further, it is possible in law to occupy premises through a licensee, and everything shows that it was the tenant that carried on the shop business. The court is really being asked to protect the tenant who is trying to carry on business in the shop.

A. E. Holdsworth in reply.

JENKINS L.J. This is an appeal from an order of his Honour Judge Sir Gerald Hurst in the East Grinstead county court, whereby he granted to the applicant, Mr. Roy Holmes Pegler, for the period of one year from February, 1952, at the existing rent and on the same terms and conditions, a new tenancy of the property comprising a shop and living accommodation and premises known as Wilmington Bookshop, and situate at Portland Road, East Grinstead. The respondent to that application was Mrs. Lydia Craven, the landlord of the premises in question, and she now appeals to this court on the ground that the plaintiff's application was not sustainable under the Leasehold Property (Temporary Provisions) Act, 1951, inasmuch as he did not possess the status necessary under that Act to enable a person to found such an application.

[His Lordship then stated the facts and continued:] Those are the circumstances to which the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, have to be applied. Mr. Pegler is the tenant. The business on the premises, on the other hand, is entirely carried on by the company on its own account. The relationship between Mr. Pegler and the company, under which the company is in occupation and carrying on the business, was described by the judge as that of a gratuitous licensee.

The first section of the Act of 1951 to which it is necessary to refer is section 10 (1), the first section in Part II, headed "Shops." It is an enabling section, stating in effect in what circumstances the Act is intended to enable an application to be made. [His Lordship read the subsection.] It thus appears that the person who is enabled to make an application is the occupier of a shop under a tenancy to which the section applies.

The argument for Mr. Pegler which prevailed before the judge was to this effect. There is no dispute that the premises are of a kind which in themselves would come within the Act, and Mr. Pegler is undoubtedly the tenant of the premises. He also claims to be the occupier. He says the section is not confined in its operation to cases of actual personal occupation by the tenant himself; it of course includes that, but that is not the only sense in which the word " occupier " is used; it includes (he argues) occupation by a servant or by an agent or by a licensee. The company in this case is a licensee of the tenant; therefore he in this indirect fashion is himself the occupier of the shop within the meaning of section 10 (1). The judge, who, as I have said, accepted substantially that argument, said: " Physically, of " course, the ' occupier ' of the shop now in question is Wilmington Bookshops Ld. But that company does not occupy ' under " ' a tenancy '; it occupies under a gratuitous parol licence from " the applicant, terminable at any moment. In my judgment " the applicant himself occupies the shop under a tenancy. His " tenancy admittedly comprises the shop as well as the living " accommodation enjoyed by himself and his family. He is also " in possession or ' occupation ' of the shop by his licensee, the " company. The company pays no rent, and has no legal or " beneficial interest whatever in the tenancy of the shop. Thus " in law the company occupies the shop on behalf of the " applicant." Then he went on to say that it followed that the requirements of section 10 (2) (*b*) were also satisfied. It will have been observed that the judge, in the passage I have read, referred to Mr. Pegler as being in occupation of part at all events of the premises himself; that refers to his occupation of the living quarters provided in the premises, in which, as I have mentioned, he lives with his wife.

Section 10 (2) provides as follows: " This section applies to a " tenancy the subject of which (*a*) consists of a shop, or (*b*) con- " sists of a shop and of living accommodation occupied wholly or " mainly by the tenant or by a person who is employed by the " tenant for the purposes of the retail trade or business carried " on in the shop, or (*c*) includes a separate part which consists " of a shop or which consists of a shop and of such living accom- " modation as is mentioned in the last foregoing paragraph." So the judge could say that the premises consisted of a shop " and " of living accommodation occupied wholly or mainly by the " tenant," for there is no doubt that the living accommodation in the present case was in the actual physical occupation of the tenant himself.

The case is one on which I, for my part, have felt some difficulty, but I have reached a different conclusion from that of the judge. I quite agree that the conception of "occupation" is not necessarily and in all circumstances confined to the actual personal occupation of the person termed the occupier himself. In certain contexts and for certain purposes it obviously extends to vicarious occupation by a caretaker or other servant or by an agent. Clearly the tenant of a retail shop who through persons in his employment carries on business there for his own benefit under a tenancy with respect to which he was tenant, would properly be described as the occupier of the shop and the person carrying on business there, though not himself in actual personal occupation of it. But I cannot regard the words "the occupier "of a shop" in section 10 (1) of this Act as going so far as to include as occupier, within the meaning of the subsection, a tenant who is not himself carrying on business on the premises in question at all either personally or by a servant or agent, but who is tenant of premises, the shop portion of which is in fact wholly taken up with the stock and the business of a limited company, that is, of an entirely distinct and different legal person. I would reserve, however, for further consideration, if and when it arises, the case of a tenant who is in fact beneficial owner of all or substantially all the issued shares of such a company. I think that conclusion is borne out by subsection (2) (*b*) of the section, for it is plain that where that subsection speaks of a "tenancy the subject of which . . . consists of a "shop and of living accommodation occupied wholly or mainly "by the tenant or by a person who is employed by the tenant for "the purposes of the retail trade or business carried on in the "shop," the word "occupied" must clearly point to actual occupation either by the tenant himself or by a person employed by the tenant in the business carried on in the shop. This, by necessary implication, means the business there carried on by the tenant. Further, it may be said that the reference to occupation by a person employed by the tenant for the purposes of the business carried on in the shop in itself suggests that the terms "occupier" and "occupation" are not used in the section in the unrestricted sense demanded by the argument put forward for Mr. Pegler; for according to that argument, occupation, not merely by the tenant's servant, but by any third party with the tenant's consent, would be occupation by the tenant himself for the purposes of the section.

Some further light on the point at issue may, I think, be derived from some of the definitions in section 20 of the Act of 1951. " Shop " is defined as meaning " premises occupied wholly " for business purposes, and so occupied wholly or mainly for the " purposes of a retail trade or business." That definition, if it is read into section 10 (1), makes the reference to a shop read (to put it shortly) as " premises occupied wholly for business " purposes," and the critical phrase in the subsection thus becomes, " for enabling the occupier of premises occupied wholly " for business purposes under a tenancy." Occupied by whom for business purposes? I should have thought the reasonable answer to be: " Occupied for business purposes by the occupier " under the tenancy; that is to say, occupied by that occupier " for his business purposes and not for the business purposes of " somebody else." " The tenant " is defined in section 20 as the person for the time being entitled to the tenancy, and clearly, as is not disputed, a person holding under a mere licence from a tenant cannot answer that description.

The only other provision of the Act to which I think reference can usefully be made is to be found in section 12 (3) (*b*). Section 12 deals with the cases in which it is proper for the court to make a grant of a new tenancy on an application under the Act. Subsection (3) sets out a number of cases in which a new tenancy must not be granted, and so far as relevant for the present purpose, provides that: " The court shall not order the " grant of a new tenancy if it is satisfied . . . (*b*) that the landlord has offered to afford to the tenant, on terms and conditions " which in the opinion of the court are reasonable, alternative " accommodation which, in the opinion of the court, is suitable " for the purposes of the tenant's business." Quite plainly that provision contemplates that the business carried on on the premises must be the business of the tenant; and I think it reinforces the conclusion that while no doubt a tenant of premises who carries on business there by agents may qualify for a new tenancy, the intention of the Act is that the businesses carried on on premises of which new tenancies may in the appropriate circumstances be granted, should be the businesses of the tenants seeking new tenancies, and not the businesses of any strangers or third parties. By no stretch of imagination, so far as I can see, can the business carried on by the company on the premises here in question be regarded as the business of the tenant. It is

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the business of the company, and nobody else, and as I think I have already said, although Mr. Pegler is (with the aid of his wife's holding of ten shares) a majority shareholder, he is not by any means the sole shareholder. The business is the company's, and although he manages it, he manages it for the company, and not on his own account.

Mr. Eastham, who presented us with a careful and persuasive argument the other way, endeavoured to satisfy us that the expression "occupier" in section 10 (1) extended (as I understood his argument) to any person carrying on business on the premises by permission of the tenant, whatever the interest of the tenant in the business might be, and even if the tenant had no interest in it at all. He founded that argument on the theory that where a tenant entitled to the possession of premises grants a third party a licence to occupy those premises, then the premises are in the occupation of the tenant by his licensee. I think the answer to that argument is that the meaning of the word "occupation" is one which must be determined by reference to the context in which the expression is used; and in my view the context makes it reasonably plain that occupation by a third party under a licence otherwise than for the purpose of carrying on a business belonging to the tenant himself does not suffice to make the tenant the occupier of a shop under a tenancy within the meaning of the Act.

Mr. Eastham referred us to three cases. One was *Paterson* v. *Gas Light & Coke Co.*,[5] concerning the position of two persons appointed by the court to be joint receivers and managers of a certain company in relation to the supply of gas to the premises of the company, and in particular their liability to pay for gas supplied to the company before their appointment. He cited that case to us for this statement[6]: "It was strenuously contended that the plaintiffs could, simply as occupiers of the mill, have required gas to be supplied to it without requiring such supply in the name of the mill company, and this view was adopted by Kekewich J. But the term 'occupier' is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person." That, I think, well illustrates the general nature of the question arising in the present case. Then Mr. Eastham referred us to the decision of this court in *Clift* v. *Taylor*,[7] and the use he made of that was this. As will be remembered, one of the grounds on which a landlord can oppose the granting of a new lease under section 5 of the Landlord and Tenant Act, 1927, is that the landlord requires the premises for occupation by himself or by a son or daughter of his over 18 years of age. In this case the landlord was a member of a firm of auctioneers and surveyors, and the premises, so it was said, were required for the use of the firm, and the question had to be decided whether the landlord really required the premises for occupation by himself within the meaning of the section, inasmuch as the firm was going to be the actual occupier. This court held that the premises were none the less required for occupation by the landlord himself because he wanted to use them for occupation by the other members of his firm as well. I do not think that case really advances the matter any further, for (apart from the difference in the context with reference to which the expression "occupation" there fell to be construed) it was a case of partnership, and each partner in a firm is an occupier jointly with his fellow partners of the partnership premises.

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[5] [1896] 2 Ch. 476.

[6] Ibid. 482.

[7] [1948] 2 K.B. 394.

The other case was *Butlins Ld.* v. *Fytche and Another*,[8] and I think that case is further removed from the present case than *Clift* v. *Taylor*.[7] The question in *Butlins Ld.* v. *Fytche and Another*,[8] as I understand it, was whether for the purpose of the Landlord and Tenant Act, 1927, goodwill had attached to an area used as a fun fair or place of entertainment of that description, by reason of a business having been carried on there by Butlins Ld. The fact was apparently that Butlins Ld. were tenants of the area and they organized and laid it out as an amusement park. They let out pitches or spaces for various amusements to be conducted by sub-tenants or licensees, and that letting out seems to have been done sometimes by a wholly owned subsidiary of Butlins. In those circumstances, this court had no difficulty in holding that Butlins could claim that by reason of their carrying on business on the premises goodwill had attached, and it was said by Tucker L.J.[9]: "Looking at this report"—that was the report of the referee under the Act—"it is clear that the whole lay-"out and the scheme of these premises was devised by Butlins. "They organized this place as an amusement park, and I think "it is clear from the referee's report that goodwill did attach to "these premises. It seems to me quite immaterial that the "goodwill may have so attached in part as a result of sub-leases

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[7] [1948] 2 K.B. 394.

[8] [1948] 1 All E.R. 737.

[9] Ibid. 739.

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"to other persons." That seems to me to be an entirely different question from the one raised in the present case.

The point is a short one, and the arguments either way are not capable of any great elaboration. Although I feel some sympathy for Mr. Pegler, speaking for myself I am forced to the conclusion that by the severance which has been brought about between the tenancy and the business, the business being vested in and carried on by the company and the tenancy being the property of Mr. Pegler, he has unfortunately for himself brought about a state of affairs in which it is impossible, on the true construction of the Act, to bring him into the category of persons who, as occupiers of shops under tenancies to which section 10 (1) applies, are able to apply for new tenancies under the provisions of the Act.

For these reasons I would allow this appeal and discharge the order for the grant of the new tenancy.

Evershed M.R. I am of the same opinion. Both Mr. Holdsworth and Mr. Eastham intimated to us that the question raised was one of significance to many persons, but I can hardly think that the very unusual series of facts which preceded the issue of the present summons can often happen. They include arrangements whereby the lessor for a substantial consideration assigned to the company, Wilmington Bookshops Ld., the goodwill of the business which Mr. Pegler no doubt now desires to possess. I propose to say no more on that aspect of the matter, save to emphasize that in this case the facts are of an unusual character.

Still the question is what, on the true construction of the Act of 1951, is the meaning of the formula "occupier of a shop under "a tenancy"; for unless Mr. Pegler proves himself to be within that description he is not a person enabled to apply for an extended tenancy. I should be repeating much that has fallen from my brother if I elaborated the point. I therefore content myself by saying that as a matter of English and having regard to the other passages to which allusion has been made, I feel forced to the conclusion—and it is not, I think, a surprising conclusion—that the occupier of the shop who may make the application must so occupy it under a tenancy, that is to say, he must be the tenant and occupy by virtue of his tenancy. Further, I think that since the "shop" must comprehend premises which are occupied for the purpose (wholly or substantially) of a retail business, the business carried on must be the business of the tenant; and, therefore, at the same time and for the reasons I have indicated, of the occupier.

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The latter proposition I think is emphasized by the language of section 10 (2) (*b*), which shows that a tenancy to which the section applies will cover the tenancy of premises, the living accommodation part of which is occupied in fact by a person employed by the tenant—for the purpose of the retail business carried on in the shop clearly, as I think, carried on by the tenant. The same point is further emphasized by section 12 (3) (*b*).

It may be that in some circumstances it could be said that a company in actual occupation was but the alter ego of the tenant. It is possible that such a conclusion might be arrived at in some cases; but it cannot, in my judgment, be arrived at in this case; for, as my brother has pointed out, the company here cannot be said to be a mere alter ego of the applicant Pegler. Though the company's right to occupy the premises is in law no doubt precarious, still it is not a wholly controlled company, and I think it is impossible, therefore, to accede to either of the arguments put forward by Mr. Eastham, who does not, I think, substantially dispute the view of the construction of the Act which I have expressed. These arguments are:—(1) that the occupation here of the company is really an occupation for and on behalf of the tenant, and is in truth but an occupation of the tenant; and (2) that the tenant and the company in some sense jointly occupy the shop.

Although we are differing from the decision of the judge, I should be guilty of mere repetition if I expanded my reasons. It is only out of respect for his judgment and the argument of Mr. Eastham that I have added these few observations to the judgment of my brother Jenkins, with whose reasons I wholly agree.

HODSON L.J. I agree. I cannot usefully add anything to the judgments which have been delivered.

Appeal allowed.

Solicitors: *Thomas Eggar & Son; Nisbet, Drew & Loughborough, for Pearless, de Rougemont & Co., East Grinstead.*

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Feb. 12.

Somervell and Denning L.JJ. and Roxburgh J.

HAVILAND AND OTHERS *v.* LONG AND ANOTHER (DUNN TRUST LD., THIRD PARTIES).

Landlord and Tenant—Breach of covenant to repair—Landlord's claim for dilapidations—Repairs paid for by succeeding tenant—Diminution in value of reversion—Tenant's liability—Sufficient that work had to be executed—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18.

By section 18 (1) of the Landlord and Tenant Act, 1927: "Damages for a breach of a covenant or agreement to keep or put "premises in repair during the currency of a lease, or to leave or put "premises in repair at the termination of a lease . . . shall in no "case exceed the amount (if any) by which the value of the reversion "(whether immediate or not) in the premises is diminished owing "to the breach of such covenant or agreement as aforesaid. . . ."

The defendant tenants being in breach of their covenant to keep and leave the premises in repair, the plaintiff landlords, shortly before the lease terminated, entered into a fresh lease with other tenants, who, while paying what was a full economic rent for premises in repair, agreed to carry out the repairs, the landlords undertaking to reimburse them out of any sum recovered from the old tenants by way of dilapidations. It was contended for the defendants that having regard to the terms of the new lease the value of the reversion had not been diminished, that the landlords had therefore suffered no loss, and had lost their right to recover damages.

Held, that at the time when the new lease was entered into the landlords had a contingent right to recover damages should the original tenants eventually be in breach of their covenants, and did not lose that right by reason of the bargain made with the new tenants. It was the fact that the repairs required to be done and not the circumstances in which the landlords and their new tenants agreed upon the manner of meeting the charge which was the governing consideration.

Per DENNING L.J.: The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages. It is *res inter alios acta.*

Decision of Lloyd-Jacob J. [1951] W.N. 532, affirmed.

APPEAL from Lloyd-Jacob J.[1]

By a lease granted in October, 1929, the plaintiffs let to the defendants premises in London. The lease was a full repairing lease for a period of years, ending on March 25, 1949. The defendants sublet part of the premises to the third parties. When the lease expired the defendants were in breach of their repairing covenants, and the cost of putting the premises into proper repair was estimated to be £1,170.

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[1] [1951] W.N. 532.

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Shortly before the termination of the original lease the plaintiffs had entered into a new lease with Messrs. Wyser & Bryant for a period of 14 years, commencing on March 25, 1949, at a rent of £1,900 a year, which the judge below found represented an economic rent for the premises in question if in good repair. The new tenants covenanted to put the premises into good decorative and structural repair within a specified time, and the landlords agreed to pay over to them any sum recovered from the defendants, the original tenants, by way of dilapidations.

The plaintiffs sued the defendants for breach of repairing covenants in the lease and the judge found for the plaintiffs for £1,170 and costs against the defendants, but gave the defendants judgment against their sub-tenants, third parties, for £600 and costs. The defendants appealed.

Salmon Q.C. and *Salkeld-Green* for the defendants.
Sachs Q.C. and *D. C. Bain* for the plaintiffs.
Duveen for the third party.

The argument sufficiently appears in the judgments.

SOMERVELL L.J. stated the facts and continued:—This case turns on the construction of two clauses in the lease granted to Messrs. Wyser & Bryant. The first is sub-clause (5a) of clause 4. That, in the first instance, provides that, assuming that when the new lease started the house would not be in good repair, the new lessees and not the landlords were to do the repairs. They covenanted to do so within a certain period; they were to employ a builder, and so on, and of course they would become primarily liable; but the clause goes on to say " that the tenants shall on " the completion of such works as aforesaid be entitled to claim " payment from the landlords of any money recovered by the " landlords from the trustees of the late Sydney Herbert Long " —that is, the original lessee—" for dilapidations as mentioned " in clause 6 hereof, less the fees of the landlords' surveyors."

Clause 6 provides: " The landlords hereby agree to pay to the " tenants on the completion to the satisfaction of the surveyors " of the decorative and other repairs referred to in sub-clause " (5a) of clause 4 hereof, any money received by them by way " of dilapidations from the trustees of the will of the late Sydney " Herbert Long, who are the present tenants, less the amount " of the surveyor's fees for preparing the specification of dilapida- " tions and settling the amount payable in respect thereof, and

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"the landlords will take all necessary steps to recover such "money and will notify the tenants of the amount proposed to "be accepted in settlement of the claim before releasing the said "trustees from their liability in respect thereof."

Before I state the argument I will refer to what is the basis of the law today with regard to covenants of this kind, namely, the provisions of section 18 (1) of the Landlord and Tenant Act, 1927, which provide (leaving out inessential words) that damages for breach of a covenant to leave premises in repair at the termination of a lease "shall in no case exceed the amount (if any) "by which the value of the reversion (whether immediate or not) "in the premises is diminished owing to the breach of such "covenant or agreement as aforesaid."

What is plain is that, as the facts show, this is not the type of case for the purpose of which the law was altered, as it was altered by section 18 (1) of the Act of 1927. This is a case where the building is still required in substantially the same form and where the repairs which the tenant failed to do have to be done in order to put the building into a state which will enable it to be used in the manner in which it is required at present to be used; whereas the Act was passed to meet primarily a case where the building was going to be pulled down or turned to some different purpose, so that the repairs were not required and the sum which the landlords recovered under the covenant would not be expended in whole or in part on the repairs covered by the covenant.

But that does not end the matter, because the Act may have produced a result which on the face of it had not been intended. The judge decided that the defendants were liable on their covenant for £1,170, and it is from that decision that they appeal. The argument is this. Mr. Salmon says—I hope I shall do justice to his argument, for I still do not find it altogether easy to follow—that if you look at the matter as on March 25, 1949, when the lease had come to an end, by that time it mattered not financially to the landlords whether the repairs were done or were not done. It was the new tenant who had to do them, and though the landlords had undertaken to recover or to take all practical steps to recover from the old tenants damages for breach of covenant to repair, Mr. Salmon said—he faced up to it, but he was forced really to say this—that by this particular method of dealing with their rights, which existed contingently or conditionally on January 14, 1949, when the new agreement was made, the landlords had lost those rights; that the cost of repairs would fall, therefore, not on the old tenant but on the new tenant, and the new tenant would be unable to derive any advantage from subclause (5a) because the landlords, having suffered no diminution in the value of the reversion, had lost their right to recover.

As I have said, I find that argument very difficult to follow. The landlords, when they entered into the new lease, had certain rights against the tenants under the old lease, and these included the then contingent right of recovering damages from those tenants if they failed to put the premises into repair. If they should perform the covenant, cadit quaestio: the premises for which the new tenants would be paying the stipulated rent of £1,900 would then be, as was intended, premises which were in a good state of repair, and they would not have had to expend any money on repairing them. But if the premises were not left in a good state of repair, the landlords plainly would have the right to recover damages from the old tenants. The damage to the reversion would be measured by the cost of the repairs, because it was everybody's intention to go on using the building as it was before, and it was economic to do so. I cannot see why that right should be lost because it is made a term in a bargain. It is obvious that if the landlords had not had this right, because, for example, there was no repairing covenant, or because for some reason they had abandoned their right to enforce it, the new lease would have been in different terms. The new tenants would never have agreed to pay what was the economic rent for a repaired building and do the repairs, unless they had been satisfied, quoad those repairs which were covered by the old lease, that they would get, through the landlords, the sum, however it was quantified, which the old tenants were liable to pay as damages for the breach of their covenant. I cannot myself understand how it can be said that because a man has bargained with a right he loses it.

In my opinion, that is much better put than I have put it, or could put it, in a paragraph in the judge's judgment, in which he says: "In my judgment it is the fact that they"—i.e., the repairs—" require to be done and not the circumstances in which " the landlord and his new tenant agree upon the manner of " meeting the charge, which is the governing consideration." That sentence, I think, is the answer to the appeal here, which, for the reasons given by the judge, with all of which I agree, must be dismissed.

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HAVILAND v. LONG (DUNN TRUST LD., THIRD PARTIES).

DENNING L.J. I agree with all that my Lord has said. The measure of damage is the extent by which the market value of the reversion at the end of the lease was diminished by the want of repair. That depends on whether the repairs are going to be done or not. In cases where they have been or are going to be done the cost of repair is usually the measure of damage. The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages. It is res inter alios acta.

I agree that the appeal should be dismissed.

ROXBURGH J. I agree. It seems to me that the argument on this appeal is in defiance of the passage from the judgment of Lawrence L.J. in *Hanson* v. *Newman*,[2] which was cited by the judge. That passage is: "A reversion may not be a reversion "in possession (i.e., it may not be immediate) by reason of the "freeholder having granted a reversionary lease, and in that "case the reversionary lease is to be disregarded in assessing "the damages." But in this case the argument can only stand upon the footing that the court does look at the reversionary lease and consider the arrangements which have been made in that lease with regard to the benefit of the covenant; and that is just what *Hanson* v. *Newman* [2] shows must not be done. I agree, therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rodgers, Gilbert & Horsley; Forsyte, Kerman & Phillips; Janson, Cobb, Pearson & Co.*

A. W. G.

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[2] [1934] Ch. 298, 305.

C. A.

1952 *Feb.* 18.

Somervell and Denning L.JJ. and Roxburgh J.

PAVIA & CO., S.P.A. *v.* THURMANN-NIELSEN.

Contract—Sale of goods—Payment—Letter of credit—Sale of groundnuts c.i.f. against confirmed credit—Provision for shipment during certain months at sellers' option—Export and import licences obtained—Buyers' delay in making credit available to sellers—Time within which credit to be opened.

In a contract for the sale of goods c.i.f., shipment at the option of the seller over a prolonged period, which provides for payment by confirmed credit, the buyer, in the absence of express stipulation, must open the credit and make it available to the seller at the beginning of the shipment period. The seller is entitled, before shipment, to be assured that he will on shipment be paid. If the buyer is anxious not to have to put the credit machinery in motion until shortly before the seller is ready to ship, a provision for that purpose must be inserted in the contract.

Decision of McNair J. [1951] W.N. 533 affirmed.

Appeal from McNair J.[1]

Special case stated by the Board of Appeal of the Incorporated Oil Seed Association.

By a contract in writing dated January 20, 1949, the sellers, K. Thurmann-Nielsen, agreed to sell, and the buyers, Pavia & Co., S.P.A., agreed to buy, about 1,500 tons of 1,000 kilograms each (with an option to the sellers to raise this quantity to 3,000 tons) of shelled Brazilian groundnuts f.a.q. shipment from Brazil in February and/or March and/or April at sellers' option, c.i.f. Genoa. The contract provided that payment was to be by the opening of a confirmed, irrevocable, divisible, transmissible and transferable credit opened in the sellers' favour and utilizable by them against delivery of certain documents, which included a complete set of "on board" bills of lading, a weight note of a certain superintendent company, an analysis certificate and a commercial invoice. The contract was made expressly subject to the sellers' obtaining an export licence and the buyers' obtaining an import licence before January 31, 1949; and it incorporated the general conditions of the Incorporated Oil Seed Association.

On January 31, 1949, that contract was varied by an addendum under which the quantity agreed to be sold was increased to 3,000 tons of 1,000 kilograms each, with shipping periods as to the first 1,500 tons at any time between February 1 and April 30, 1949, and as to the second 1,500 tons at any time between March 1 and May 31.

The export licence was obtained on February 9, 1949, by the sellers, who immediately advised the buyers by cable, giving the necessary particulars. The Italian import licence, which could not be obtained until the Brazilian export licence had been granted, was obtained on March 4. On February 9 the sellers had asked the buyers to open the credit under the two contracts, and continued to press them to do so throughout February and March, 1949. The buyers repeatedly told the sellers that the credit would be available in a few days' time, but it was not in fact made available until April 22, 1949. The sellers' bankers in Brazil refused to agree to the goods being sent to the port of shipment unless and until they were satisfied that a credit as stipulated in the contract had been opened by the buyers in the sellers' favour. The sellers dispatched about 675 tons after April 22, 1949, but never shipped the balance of about 2,325 tons. They subsequently brought arbitration proceedings, claiming damages for breach of contract by the buyers in failing to open the credit.

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[1] [1951] W.N. 533.

At the hearing by the board of an appeal from the umpire's award awarding damages to the sellers, it was contended for the buyers that their obligation under the contracts was confined to providing the credit in time only to be available against presentation of documents.

For the sellers it was contended that the credit required under the contracts must be made available to them throughout the whole of the shipping period, or, alternatively, as soon as possible from the beginning of the period or within a reasonable time from that beginning.

The board considered that in so far as it was a question of fact, the buyers should have taken steps forthwith to open the credit when they were advised by the sellers on February 9 that the export licence had been obtained. As to the law they submitted for the decision of the court the question when, on the facts as found and the true construction of the contracts, the credit should have been opened by the buyers or made available to the sellers.

McNair J. returned the following answer: "The date when "the credit under the contracts should have been opened by the "buyers and made available to the sellers is, as regards the first "1,500 tons, at such time as it would have been opened or made "available if the buyers had exercised reasonable diligence after "February 9 to obtain the opening and making available of the "credit; and that, as regards the second 1,500 tons, it should "have been opened on March 1, 1949, or so soon thereafter as it "could have been opened by the exercise of reasonable diligence "by the buyers after February 9, 1949."

The buyers appealed.

J. P. Widgery for the buyers.

Mocatta Q.C. and *M. Holman*, for the sellers, were not called upon.

SOMERVELL L.J., having stated the facts, and the question of law stated by the board and the answer given by McNair J., said:—It will be seen that the judge takes February 9 and not February 1, which was the beginning of the shipment period, for the first 1,500 tons. The reason for that is that in his judgment it was accepted as common ground that it was not until February 9, when the export licence was obtained, that certain particulars which were required by the buyers for the opening of the credit were transmitted by the sellers to them. Speaking for myself, I would have no doubt, apart from any question arising with regard to export licences, that under this contract the obligation of the buyers was prima facie to open the credit on February 1 and to have it opened and available as from that date. Naturally, as the original term with regard to licences had stood, either side could have cancelled, because no licence was in existence on January 31. But under the supplemental contract under which the sellers guaranteed the Brazilian licence and the buyers guaranteed the Italian import licence, I should have thought they passed out of the picture, as such, as relevant to the date when the credit was to be opened, though it might well have been that if that clause was in the original contract the buyers should have been allowed a reasonable time after February 1, because until that date came it was not clear whether the deal would be on at all. But as the judge has taken February 9 and not February 1, that seems to me to be no longer of any importance.

The argument, which was very clearly put by Mr. Widgery, was on these lines: Normally, delivery and payment are concurrent conditions. You do not really need the credit until you are ready to deliver and have got your bills of lading, when you can go round to the bank and get your money. That is the object of it, to see that the seller can get immediate payment. He read to us, as he read to the learned judge below, certain cases in which Scrutton L.J. pointed out (as, of course, I accept) that the main object of the credit system is that the seller may get his money when he has shipped his goods and, at any rate, in some forms of credit the buyer gets an interval of time before he has to meet bills. Whether under this particular form of credit there would be any interval of time between the time of its operation and the time when the buyer had to put his bank in credit I do not know, and to my mind it does not matter. I am quite clear that Scrutton L.J. was not addressing himself to the problem which is at present before us. My view is that the contract would be unworkable if, as suggested by Mr. Widgery, the buyer under it was under no obligation until a date, which he could not possibly know, and which there is no machinery for his finding out, namely, when the seller actually has the goods down at the port ready to be put on to the ship. There are no words in the contract which would justify us in arriving at that result and there is no reason why we should imply any such term into this contract. I do not think it is a question of implication. I think when a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period. If the buyer is anxious, as he might be if the period of shipment is a long one, not to have to put the credit machinery in motion until shortly before the seller is likely to want to ship, then he must put in some provision by which the credit shall be provided 14 days after a cable received from the seller, or the like. In the absence of any provision of that kind, I think the answer which the judge gave to the question posed is plainly right, and the appeal should be dismissed.

DENNING L.J. The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it.

The question in this case is this: In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of express stipulation, I think the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship; and whenever he does ship the goods, he must be able to draw on the credit. He may ship on the very first day of the shipment period. If, therefore, the buyer is to fulfil his obligations he must make the credit available to the seller at the very first date when the goods may be

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lawfully shipped in compliance with the contract. I agree with the answer given by McNair J. The appeal should be dismissed.

ROXBURGH J. I agree.

Appeal dismissed.

Solicitors: *Hicks, Arnold & Co.; Richards, Butler & Co.*

A. W. G.

HAYWARD *v.* MARSHALL.

[Plaint No. G. 663.]

WINCHESTER *v.* SHARPE.

[Plaint No. G. 667.]

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Evershed M.R., Jenkins and Hodson L.JJ.

Landlord and Tenant—Rent restriction—Dwelling-house—Three rooms let—Right to draw water in kitchen and boil washing once a week—Whether premises let as a " separate dwelling-house "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2).

In the first case a landlord had let three unfurnished rooms in a dwelling-house to a tenant, together with a right to draw water in the kitchen and once a week to use the gas stove in the kitchen to boil washing. In the second case a landlord had let two unfurnished rooms to a tenant with the right to draw water in the kitchen. The landlords had in each case determined the tenancy by notice to quit and in these proceedings sought to recover possession. The county court judge held that there was a sharing of the house in question and accordingly the tenants were not entitled to the protection of the Rent Restriction Acts. On appeal:—

Held, that the authorities beginning with *Neale* v. *Del Soto* [1945] K.B. 144 established that it could not be said that part of a dwelling-house was let to a tenant as a separate dwelling-house within the protection of the Rent Restriction Acts if his contract of tenancy included a mere right of sharing, as distinct from the exclusive possession of, some essential part of the living accommodation provided. For the principle laid down in *Neale* v. *Del Soto* to apply there must be both a sharing of some room not included in the tenancy and that room must be part of the essential living accommodation. The rights of the respective tenants over the kitchens in these two cases did not amount to a sharing of the kitchens. The rights granted to the tenants did not extend to using the kitchen as such as part of the living accommodation provided under the tenancy. These rights were simply rights in the nature of easements in no way distinguished by reference to the character of the room over which they were exercised. Not only the character of the room over which rights were exercised but also the character of the rights exercised over it was material in considering whether there was a sharing.

Decision of the county court judge reversed.

Neale v. *Del Soto* [1945] K.B. 144, and *Cole* v. *Harris* [1945] K.B. 474 explained and followed.

Winters v. *Dance* [1949] L.J.R. 165; *Baker* v. *Turner* [1950] A.C. 401 and *Rogers* v. *Hyde* [1951] 2 K.B. 923 considered.

APPEAL from a decision of Judge Leon sitting at Windsor county court.

The facts in these two cases were similar. In the first, the landlord, George Harold Hayward, in July, 1939, had let to the tenant Eva Marshall three unfurnished rooms in 49 Marlow Road, Maidenhead, a house within the protection of the Rent Restriction Acts. The landlord had granted to the tenant a right to draw water in the kitchen of the house at all reasonable times for all purposes and also the right to use the gas stove in the kitchen once a week for the purpose of boiling her washing. The tenant had no other right to use the kitchen. In the second case the landlord, Mrs. Louise Emily Winchester, had let to the tenant, Annie Sharpe, two unfurnished rooms in a dwelling-house with the right to draw water in the kitchen of the dwelling-house. The tenant was granted no other rights over the kitchen. In each case, the landlord having determined the tenancy by notice to quit, sought in these proceedings to recover possession.

The county court judge in each case gave judgment for the landlord for possession. He stated that he felt constrained by the authorities to come to the conclusion that the tenants had not within section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[1] been let separate dwellings but the tenancy agreements merely amounted to a sharing of the two dwelling-houses.

The tenants appealed.

Claude Duveen for the tenants. The question here is whether there was such a sharing by the tenants of these kitchens as to

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2): "This Act shall apply to a "house or a part of a house let as "a separate dwelling. . . ."

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bring the case within *Neale* v. *Del Soto.*[2] The county court judge held that any use of a kitchen by a tenant amounted to a sharing so as to take the tenancy out of the protection of the Rent Restriction Acts. That is a wrong reading of the decision.

It appears from *Cole* v. *Harris*[3] that it is not every use of a kitchen which amounts to a sharing of the kitchen. The kitchen must be used as a living room for there to be a sharing of it. A mere right of access to the kitchen does not amount to a sharing. Another test is whether the tenant can be said to be dwelling in any part of the premises which he is said to be sharing. There may be a distinction between a concurrent sharing and a consecutive sharing, the former only being such a sharing as to take the tenancy out of the protection of the Acts. It is submitted that a mere right to draw water in a kitchen and to boil washing is not a sharing of the kitchen. [He referred to *Kenyon* v. *Walker*,[4] *Winters* v. *Dance*,[5] *Baker* v. *Turner.*[6]]

Gordon Hardy for the landlords. The speech of Lord Normand in *Baker* v. *Turner*[6] makes it clear that there is no distinction in principle between a right to share the kitchen and a licence to use the kitchen. In either case there is a sharing of the room and there cannot be a separate letting. That that is the true view appears from the judgment of Lord Asquith in *Rogers* v. *Hyde.*[7] Where rights are conferred in a living room which do not give separate possession of it, there is a sharing and not a separate letting. Parliament did not intend that the Rent Restriction Acts should apply where living accommodation is shared.

Claude Duveen in reply. The decision of the House of Lords in *Baker* v. *Turner*[6] has not altered the position. That was a case of the sharing of a kitchen. The tenants agree that if there is a right to use the kitchen for cooking that there is a sharing. It is submitted that the test is whether there is a right to use a living room for "dwelling" purposes. If the right does not involve a "dwelling" purpose, such as cooking, there is no sharing. The right to draw water is an easement. Whether premises are let as a separate dwelling-house or not cannot depend on whether the tap is in the kitchen or in a passage.

HODSON L.J., having stated the facts, continued:—The question which has to be considered in the case first came before the

[2] [1945] K.B. 144.
[3] [1945] K.B. 474.
[4] [1946] 2 All E.R. 595.
[5] [1949] L.J.R. 165.
[6] [1950] A.C. 401.
[7] [1951] 2 K.B. 923.

Court of Appeal in *Neale* v. *Del Soto*,[8] in which the only judgment, with which the other Lords Justices agreed, was delivered by Morton L.J. In that case there was an oral agreement. The tenant was let two unfurnished rooms in a seven-roomed house, together with the use, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. It was held that there there was a sharing of the house, each party having the exclusive use of some rooms and the two parties together having the use in common of other rooms, and there was, therefore, not a letting of the two rooms as a separate dwelling within the meaning of section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The first point to be noticed about that case is that Morton L.J. was dealing with the matter as a question of fact, the county court judge having found that "what was let was two unfurnished rooms for the sole use and occupation by the tenant, and "the garage, kitchen, bathroom, lavatory, coal-house and conservatory for use and occupation by him jointly with the "landlord. . . . When, as in this case, a person has got in a "lease at a rent two rooms and the use in common with the "owner of other rooms, such as the kitchen, that is a sole "tenancy of two rooms and a joint tenancy, as it were, of the "other rooms, since he has a right to use them in every way, not "merely as an accessory to something else." At the end of his judgment, Morton L.J. used this language[9]: "I am satisfied, "on the facts of this case, that the county court judge's decision "was right, and this appeal ought to be dismissed." In the course of his judgment, he had answered the question "Were the "two rooms in question in the present case a part of a house let "as a separate dwelling?" in this way: he said: "In my view, "they were not. What was let was the two rooms together with "the use, in common with the landlord, of the garage, kitchen, "bathroom, lavatory, coal-house and conservatory, and it would "be a misuse of language, to my mind, to say that the two "rooms, and nothing more, were let as a separate dwelling. The "real substance of the matter was that there was a sharing of the "house. Each party had the exclusive use of some rooms and "the two parties together had the use in common of other "rooms."

That case gave rise to a consideration of the further problem which arose when the rooms which were shared were not living-rooms. That matter was considered by Morton L.J. in *Cole* v.

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[8] [1945] K.B. 144, 146.

[9] Ibid. 147.

Harris.[10] In that case, a landlord had let to a tenant three rooms, consisting of a bedroom, living-room and kitchen, on the first floor of a dwelling-house, together with the joint use, with the landlord and the tenant of the second floor, of a bathroom and water closet. It was held by Morton and Mackinnon L.JJ. "that there was a demise of the three rooms as a separate "dwelling and not a mere sharing of the whole house. It was "difficult to define, as a matter of legal principle, the dividing "line between the two classes of case, but the most satisfactory "formula seemed to be to say that if there was a sharing of "essential *living* rooms (which would include the kitchen) there "would not be a demise of the premises as a separate dwelling-"house." Morton L.J. examined the matter very closely, and he used this language[11]: "I think that the true test, where the "tenant has the exclusive use of some rooms and shares certain "accommodation with others, is as follows: there is a letting of "part of a house as a separate dwelling, within the meaning of "the relevant Acts if, and only if, the accommodation which is "shared with others does not comprise any of the rooms which "may fairly be described as 'living rooms' or 'dwelling rooms.' "To my mind a kitchen is fairly described as a 'living room,' "and thus nobody who shares a kitchen can be said to be tenant "of a part of a house let as a separate dwelling." Then he drew a distinction in considering the bathroom and the water closet as being rooms which were visited only on occasions and could not fairly be classed as living rooms.

Cases have come before the county courts from time to time in which the question has arisen as to what is a sharing, within the meaning of the decision in *Neale* v. *Del Soto*,[12] and we were told that in cases rather like this case the county court judges have taken the view that sharing does not extend to a bare right of passage through a room, nor to a right to use a kitchen only for scullery purposes or for bathing in the bath it contains. For my part, I see nothing in the decisions of *Neale* v. *Del Soto*[12] and *Cole* v. *Harris*[13] to lead one to the conclusion that the mere use of a room for purposes other than what might be described as living purposes amounts, in the ordinary use of language, to sharing the room. The mere fact that a person who lives in the house is allowed to go into the kitchen, whether to draw water or indeed, as the Master of the Rolls suggested in argument, to have a bath there, would not be properly an illustration of a sharing of the room. The kitchen is a room which is normally used for cooking and for living in. The mere right of access to the room does not seem to me to be properly described as a sharing of the room.

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[10] [1945] K.B. 474.
[11] Ibid. 485.
[12] [1945] K.B. 144.
[13] [1945] K.B. 474.

There are two other cases which support this view, Morton L.J. (who again had to consider the problem, or an analogous problem, in *Kenyon* v. *Walker*[14]) said, in considering the use of a kitchen which was used for cooking purposes only: "After all, "the primary purpose of a kitchen is for cooking, and in this case "there is no doubt that the use of the kitchen, at any rate for "that primary purpose, was shared by the parties. It seems to "me that the present case comes both within the wording of the "test as I expressed it and as it was expressed by Mackinnon "L.J. in *Cole* v. *Harris*.[15] I said, 'nobody who shares a kitchen "'can be said to be tenant of a part of a house let as a separate "'dwelling.'"

We were referred to one other case, *Winters* v. *Dance*,[16] in which a judgment was delivered by Tucker L.J. The question there was whether a kitchenette, which was so small as to be unsuitable for any purpose except that of cooking itself, could come within what might be described as the *Neale* v. *Del Soto* principle. He said[17] that the authorities indicated "that in "ascertaining whether or not there has been a letting of part of a "dwelling-house as a separate dwelling, or whether there has "been a sharing of the house, one of the tests is: does the tenant "share one of the essential living-rooms? It is to be observed "that nowhere in the cases referred to have judges used the word "'sitting-room'; the word is 'living-room.' I think that the "basis of the decisions is that a room which is used for the "primary purpose of cooking is a living-room."

There is nothing in those cases which in my view supports the conclusion at which the county court judge arrived. However, Mr. Hardy, in endeavouring to support the judgment, has relied on two recent cases, which are not directly in point, but which he says tend to support the view, first, as is no doubt right, that there is no distinction between a licence to use the kitchen and a sharing of the kitchen; in other words, that the relationship between the landlord and the tenant cannot be altered by calling the right to share the kitchen a mere licence to use the kitchen. He goes on to say that it follows from what was said by Lord

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[14] [1946] 2 All E.R. 595, 598.

[15] [1945] K.B. 474, 485.

[16] [1949] L.J.R. 165.

[17] Ibid. 169.

Reid in *Baker* v. *Turner*,[18] that once you have established any right in a tenant to use the living-room for any purpose, apart from a purpose which might be described as de minimis, then that tenant is in a position of sharing the room so as to lose the protection of the Rent Acts. In particular, he relies on the passage[19]: "It is perhaps easier to say what is not a separate "dwelling than to say what is one. In *Neale* v. *Del Soto*[20] the "owner of a house, in addition to letting two rooms to a tenant, "gave him the right to share the use of other rooms including "the kitchen." Then Lord Reid refers to another case, and says he has no doubt the decision in *Neale* v. *Del Soto*[20] is correct. He goes on[21]: "If a tenant has to share with another person a "living room which is not let to him, it is in my view impossible "to find anything which is let to him as a separate dwelling. It "cannot be the let rooms plus the right to use the other room, "because that other room is not to let to him at all—he is only a "licensee there. And it cannot be the let rooms alone, because "his having to share another room shows that the let rooms are "only a part of his dwelling place."

Mr. Hardy referred, in addition, to a judgment of Lord Asquith in *Rogers* v. *Hyde*,[22] where Mr. Megarry had put forward the argument that there was for this purpose no distinction between a sharing and a licence, and that was accepted by Lord Asquith in these words[23]: "I accept Mr. Megarry's argument in "its essentials so far as they are applicable in this case. The "grantee of a licence to use a kitchen seems to me to differ in "name only from the grantee of a right to 'share' or use it in "common with the landlord. . . . If we decided otherwise the "effect of *Neale* v. *Del Soto*,[20] which has been accepted by the "House of Lords, could be circumvented in every case by simply "substituting the word 'licence' for 'share' or for 'right to use "'in common'."

In my judgment, what is said by Lord Asquith and by Lord Reid does not really touch the question in this case, which is whether there is, according to the ordinary use of language, a sharing of the kitchen. The county court judge having indicated that if he had felt unfettered by authority he would have found that there was no sharing, in my judgment it is the duty of this court to reverse his finding, on the ground that there is nothing in the authorities to which we have been referred and to which he

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[18] [1950] A.C. 401.
[19] Ibid. 437.
[20] [1945] 1 K.B. 144.
[21] [1950] A.C. 401, 437.
[22] [1951] 2 K.B. 923.
[23] Ibid. 934.

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referred in his judgment which forces him to find the facts in an opposite way.

In my judgment, these appeals should be allowed.

JENKINS L.J. I agree. The county court judge, in his judgment in *Hayward* v. *Marshall*, in which he gave his reasons for deciding both cases as he did, thus stated his view of the law deducible from the authorities: "If you let to a tenant two "rooms and (save for the one qualification which I will mention) "the use for any purpose of another room, it does not seem to "me that the premises let to the tenant can be said to be let as "a separate dwelling, as long as the principle laid down in *Neale* "v. *Del Soto* [24] is accepted. I said there was a qualification. "There are in fact two qualifications: In the first place, it has "been held by the Court of Appeal that if the room of which use "is given is a bathroom or lavatory or a box-room or something "of that sort, that does not prevent the letting as a whole from "being a letting of a separate dwelling. That is the decision in "more than one case in the Court of Appeal, and naturally I "shall follow it, although I am bound to say I do not fully understand the principle of those cases once the principle in *Neale* v. "*Del Soto* [24] is accepted as being correct."

With respect to the judge, I cannot regard that passage as correctly stating the law. The effect of the line of authorities in this court, beginning with *Neale* v. *Del Soto*,[24] is simply this: that it cannot be said that a part of a house is let to a tenant as a separate dwelling if his contract of tenancy includes a mere right of sharing, as distinct from the exclusive possession of, some essential part of the living accommodation provided under the contract of tenancy. The judge's way of stating the law produces a very different result, for his view is that if a tenancy of some of the rooms in a house includes the right to use for any purpose another room not itself included in the tenancy, then (apart from cases of "de minimis") the application of the Rent Acts is excluded, whatsoever the nature of the right may be, if the room over which it is exercisable can be described as forming part of the essential living accommodation comprised in the house as a whole.

In my view, there is no warrant for that at all. In such a case the first question to ask is: "Is there under this contract a "sharing of some room not actually included in the tenancy?"

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[24] [1945] K.B. 144.

If that question is answered "No," then no further question arises. If that question is answered "Yes," then there arises the further question: "Is that room part of the essential living "accommodation?" In my view, both those questions must be capable of an affirmative answer in order to bring the principle of *Neale* v. *Del Soto* [24] into play at all.

In these two cases, the rights held by the county court judge as sufficient to oust the protection of the Rent Acts consisted in the one case of the right of drawing water in the kitchen, with an additional right of using the gas stove in the kitchen weekly for the purpose of boiling the wash, and in the other case simply of the right of drawing water in the kitchen. I cannot regard the rights over the kitchen in either case as rights amounting to a sharing of the kitchen. They do not extend, as I understand them, to using the kitchen as such, to using the kitchen as part of the living accommodation provided under the contract of tenancy. They are simply rights in the nature of easements, in no way distinguished by reference to the character of the room over which they are exercised. The right of drawing water, is no different in kind because the tap happens to be in the kitchen, than it would be if the tap was in some out-house not itself included in the tenancy. Similarly, the right of boiling washing in the kitchen seems to me not essentially different from a similar right given with respect to a copper in an out-house not itself included in the tenancy. These rights, in my view, clearly do not amount to rights to the use of the kitchen as part of the tenants' living accommodation.

It must never be forgotten in these cases that this is the decisive test, as was clearly shown by Morton L.J. in the case of *Cole* v. *Harris*,[25] where, after quoting from his judgment in *Neale* v. *Del Soto*,[24] he said this: "It cannot be that any sharing of any room, "however unimportant, takes the property outside the operation "of the Act. The words may be susceptible of that construc-"tion, but so to construe them would be to defeat, to a large "extent, the purpose of the Act. For instance, take a case in "which an entire floor of a house is let to a tenant, and there is "no sharing of any room, except that the tenant is allowed, in "common with the landlord, to store his boxes in an attic. It "seems to me quite contrary to the intention of the Act to "exclude from its operation a letting of this nature, where the "tenant is, I think, 'dwelling' in a 'separate' part of the

[24] [1945] K.B. 144.

[25] [1945] K.B. 474, 482, 483.

"house." So here it seems to me that the tenant cannot rightly be held not to be dwelling in a separate part of the house merely because the tenancy carries with it the right to fetch water from the kitchen or to carry out a weekly boiling of wash on the gas stove in the kitchen.

As has been pointed out by my brother Hodson, I think it is reasonably plain that Morton L.J., in the case of *Kenyon* v. *Walker*,[26] recognized that not merely the character of the room over which rights are exercised but also the character of the rights exercised over it were material in considering whether there was a sharing. I need not read at length the passage to which my brother has already referred, where Morton L.J., dealing with the tenant's argument based on the fact that in that case the kitchen could only be used for the purpose of cooking, said this [27]: "To my mind, ingenious though the argument is, we should be "introducing an unwarrantable extra refinement into the test "which has been already laid down by this court if we accepted "that argument. After all, the primary purpose of a kitchen is "for cooking, and in this case there is no doubt that the use of "the kitchen, at any rate for that primary purpose, was shared "by the parties." If the law had been that any right over a kitchen not capable of being discounted by reference to the maxim "de minimis" amounted to a sharing of the kitchen, it seems to me that this passage in Morton L.J.'s judgment would hardly have been appropriate, and that if he had wished to lay down any such principle he would simply have said: "It matters "not that the right over the kitchen here was limited; any right "given to a tenant over a kitchen not itself included in the "tenancy amounts to a sharing of the kitchen." As the passage actually stands, he clearly implied that the character of the right over the kitchen was a material factor. In my view, it clearly is and must be a material factor.

I have only to add that I have listened with attention to the interesting argument of Mr. Gordon Hardy for the landlords and, notwithstanding his submission to the contrary, can find nothing in the speeches of their Lordships in *Baker* v. *Turner*,[28] in any way inconsistent with my conclusion that the learned county court judge in these two cases misconceived the effect of the authorities and misdirected himself in law; the true questions to be asked and answered being, not merely whether there was some

[26] [1946] 2 All E.R. 595.
[27] Ibid. 598.
[28] [1950] A.C. 401.

right given over the kitchen in either case, but whether the right given did amount to a sharing of the kitchen. As appears clearly from his judgment, if he had considered the matter untrammelled by the view he had formed of the law, he would have answered the second of those questions in the negative.

Accordingly, in my view, these appeals should be allowed.

EVERSHED M.R. I am of the same opinion. I agree with Mr. Hardy that the question to be determined in all cases of this character is whether the person against whom possession is claimed (whom I will call "the defendant") is shown to be a tenant of premises let to him or her as a separate dwelling. In arriving at the answer to that essential question, the courts have laid it down (and I do not refer again to the cases to which my brethren have already made reference) that where, as regards some part of his or her living accommodation, the defendant is shown in fact to have no more than a right or licence to share that part in common with the landlord, a negative answer to the question is given, because in consequence of that finding the living accommodation of which the defendant is the tenant is incomplete. The result, as I think, depends upon the proposition that a sharing which disentitles the defendant to the protection of the Act is a sharing of living accommodation as such. Hence is found the distinction between the cases of sharing a kitchen, on the one hand, and cases of sharing a bathroom or lavatory upon the other. It does not, I think, help to solve the problem merely to give to a kitchen the label of "living-room." The distinction rests rather upon the view that the ordinary uses and purposes of a kitchen are essential manifestations of living or residence, so that if a tenant of rooms has to rely upon some licence for the exercise of those essential manifestations, he is not, as I have said, the tenant of a separate dwelling. But, in my judgment, it does not follow (nor do I think have any of the cases so decided) that any common user (other than such as can be disregarded on the principle of de minimis) is equivalent to a sharing. The question then is: Is there in any particular case in truth a sharing; that is, a right in common with other persons to use a living-room as such? That seems to me prima facie to be a question of fact and of degree. In this case, as my brethren have pointed out, the judge (as I think on ample evidence) would have found as a fact—indeed, did find as a fact—that there was no such sharing.

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The result, in my judgment, is that both appeals should be allowed.

Appeals allowed.

Solicitors: *Bower, Cotton & Bower, for T. W. Stuchbery & Son, Windsor; Wilkinson, Howlett & Moorhouse; Gamlen, Bowerman & Forward, for Lovegrove & Durant, Windsor.*

B. A. B.

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Jenkins and
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TYMAN'S LD. *v.* CRAVEN.

[1951 G. No. 3772 A.]

Company—Registration—Dissolution by withdrawal of name from register—No winding-up—Application in company's name during dissolution for grant of new lease—Subsequent order restoring company to register—Validity of acts done during dissolution—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 352 (1), 353 (1) (2) (3) (5) (6)—*Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 12.

A company which had failed to perform its statutory duties, though continuing to carry on trade, was struck off the register of companies pursuant to section 353 of the Companies Act, 1948, and thereby dissolved.

During the period of its dissolution an application was made in the company's name to a county court for the grant of a new lease of a lock-up shop under section 12 of the Leasehold Property (Temporary Provisions) Act, 1951. The hearing was adjourned, and before it was resumed, the company's name had been restored to the register by an order of the court under subsection (6) of section 353.

At the adjourned hearing of the application for a new lease, a preliminary objection was taken on behalf of the respondent lessor that, as the company had not been in existence when the application was first made, the application was a nullity and could not be entertained. The county court judge considered the objection well founded and refused to hear the application.

On appeal by the company:—

Held (*per* Evershed M.R. and Hodson L.J.), (1) that an order of the court made under section 353 (6) of the Companies Act, 1948,

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

restoring to the register the name of a company previously dissolved under subsection (5) of the same section, and declaring that "the company shall be deemed to have continued in existence as "if its name had not been struck off," is effective to validate retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and the restoration of its name to the register; and that the county court accordingly had jurisdiction to consider the application for a new lease:

(2) that the final words of the subsection empowering the court "to give such directions and make such provisions as seem just for "placing the company and all other persons in the same position "as nearly as may be as if the name of the company had not been "struck off," are not expository, qualifying the scope of the preceding general words, but complementary only to those general words, so as to enable the court to achieve to the fullest extent consistent with justice the "as you were" position of the company.

Per Jenkins L.J. dissenting: On the true construction of the section an order of the court restoring a company to the register (1) operates only to restore and preserve the original corporate status and identity of the company, and (2) may at the discretion of the court provide for the validation of acts done during dissolution, but (3) does not in the absence of any such provision validate any such acts.

Morris v. *Harris* [1927] A.C. 252 distinguished.

Appeal from Judge Fraser Harrison, sitting at St. Helen's and Widnes county court.

On November 10, 1950, the registrar of companies struck off the register the name of the appellant company, Messrs. Tyman's Ld., a private limited liability company, whose registered office was situate at 27 Dale Street, Liverpool, and which carried on the business of retail fishmongers at various addresses, including 136 Liverpool Road, Huyton, Liverpool, a lock-up shop, of which the respondent, Walter Craven, was the lessor. The company was struck off the register pursuant to the provisions of section 353 (5)[1] of the Companies Act, 1948, for failure to make annual returns in performance of its statutory duties; and the company was thereby dissolved.

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[1] Companies Act, 1948, s. 353: "(1) Where the registrar of companies "has reasonable cause to believe that "a company is not carrying on business or in operation, he may send "to the company by post a letter "inquiring whether the company is "carrying on business or in operation. "(2) If the registrar does not within "one month of sending the letter "receive any answer thereto, he shall "within fourteen days after the expiration of the month send to the "company by post a registered letter "referring to the first letter, and "stating that no answer thereto has "been received, and that if an answer "is not received to the second letter "within one month from the date "thereof, a notice will be published in "the Gazette with a view to striking "the name of the company off the "register. (3) If the registrar either "receives an answer to the effect that "the company is not carrying on business or in operation, or does not

On July 23, 1951, an application was made in the company's name to the county court for a new lease from the lessor of the lock-up shop and premises in Liverpool Road, Huyton, Liverpool, under section 12 of the Leasehold Property (Temporary Provisions) Act, 1951, July 24 being the expiration of the statutory time limit for making such an application.

The date allocated for the hearing of the application was September 6, but it was adjourned by consent of the parties and heard on October 31, 1951. Meanwhile, on an application dated September 15, 1951, to the Chancery Court of the County Palatine of Lancaster under section 353 (6) of the Act, an order was made on October 15 (in the absence of and without notice to the lessor) "that Tyman's, Limited, be restored to the Register of "Companies." The order of the court followed the language of the subsection and contained a declaration that on delivery of an office copy of the order to the registrar of companies "the company shall be deemed to have continued in existence as if its "name had not been struck off." The order contained no special terms, affecting the question before the court. All the terms of the order were complied with, and the company's name was restored to the register on October 26, 1951.

"within one month after sending the "second letter receive any answer, he "may publish in the Gazette, and "send to the company by post, a "notice that at the expiration of three "months from the date of that notice "the name of the company mentioned "therein will, unless cause is shown "to the contrary, be struck off the "register and the company will be "dissolved. . . . (5) At the expiration "of the time mentioned in the notice "the registrar may, unless cause to "the contrary is previously shown "by the company, strike its name off "the register, and shall publish notice "thereof in the Gazette, and on the "publication in the Gazette of this "notice the company shall be dissolved: . . . (6) If a company or "any member or creditor thereof feels "aggrieved by the company having "been struck off the register, the court "on an application made by the company or member or creditor before "the expiration of twenty years from "the publication in the Gazette of the "notice aforesaid may, if satisfied that "the company was at the time of the "striking off carrying on business or "in operation, or otherwise that it is "just that the company be restored "to the register, order the name of "the company to be restored to the "register, and upon an office copy "of the order being delivered to the "registrar for registration the company shall be deemed to have continued in existence as if its name "had not been struck off; and the "court may by the order give such "directions and make such provisions "as seem just for placing the company "and all other persons in the same "position as nearly as may be as if "the name of the company had not "been struck off."

At the adjourned hearing on October 31, 1951, the respondent lessor took a preliminary objection that, as the company was not in existence on July 23, 1951, when the application for a new lease was made, the application was a nullity, and could not be entertained. The county court judge considered the objection well founded and refused to hear the application.

The company appealed.

Leonard Caplan for the company. The general words of section 353 (6) that " the company shall be deemed to have continued " in existence as if its name had not been struck off " validate retrospectively all acts done during dissolution in the name of the company. The section applies where a company has mistakenly been treated as defunct, although it has continued its ordinary trading activities.

[EVERSHED M.R. What is the significance of the final words of the subsection?]

They provide for the validation of all acts done during dissolution. The mere deeming of the company to be in existence might not be enough to restore the situation; e.g., if X had a contract with the company, with an option to renew up to a certain date, or a lease which could be extended if notice were given on a certain date, and X, having heard that the company had been struck off, omitted to take the necessary action, X's position would not be restored if the order of the court stated only that the company had never been struck off; but a direction under the final words of the subsection could provide that X could give notice. See Buckley, 12th ed., p. 705: the effect of an order restoring the company's name is " to place all parties in the same " position as if the company had never been dissolved."

Morris v. *Harris*,[2] where the House of Lords was considering the position under section 223 of the Companies (Consolidation) Act, 1908, is distinguishable. That section was the forerunner of section 352 of the Act of 1948, dealing with dissolution after winding up, and not of section 353. The two sections were and are very differently worded: see the speech of Lord Blanesburgh.[3]

[EVERSHED M.R. Suppose there had been no application for restoration when the application for the new lease was heard?]

The judge would then have been bound to strike out the application. The judge took the view that there was no valid application; but the statute says in effect: " Notwithstanding the

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[2] [1927] A.C. 252.

[3] Ibid. 267–9.

"fact that there was no valid application because the company "was non-existent at the time, the order is that 'the company "'shall be deemed to have continued in existence as if its name "'had not been struck off' and therefore the application is "validated."

[JENKINS L.J. But this is an exceptional case. Usually the company struck off has ceased to carry on business. In this case, it is the court which must disentangle its affairs.]

But this subsection deals expressly with an erroneous striking off.

[JENKINS L.J. It becomes a company without fresh formalities.]

One must distinguish between sections 352[4] and 353. What is enough for section 352 is not enough for section 353.

S. Pascoe Hayward Q.C. and *Richard Bingham* for the respondent lessor. Section 353 (6) is concerned only to restore the corporate existence of the company during the dissolution interval, and has no effect on third parties. It cannot validate the application for the new lease. The language of the subsection is general, and the legislature did not contemplate the result that all acts during dissolution would automatically be validated by restoration of the company's name to the register. If there were automatic validation by the general words, the concluding words providing for the court to "give directions . . ." would be surplusage.

[EVERSHED M.R. Suppose a workman started an action for negligence against his employers, a company, and found that the company had been struck off? Why could not the proceedings be validated?]

They would require an order of the court, in order to put the company and the third party in the position in which they would have been if there had been no dissolution.

The effect of the order is to validate internal acts of the company and not external acts. The restoration certainly has *an* effect, but the difficulty is to distinguish which acts are automatically validated and which acts require an order of the court. If an agent is unauthorized, ratification is impossible: see *Dibbins*

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[4] Companies Act, 1948, s. 352 (1): "Where a company has been dissolved, the court may at any time "within two years of the date of the "dissolution, on an application being "made for the purpose by the liquidator of the company or by any other "person who appears to the court to "be interested, make an order, upon "such terms as the court thinks fit, "declaring the dissolution to have "been void, and thereupon such proceedings may be taken as might have "been taken if the company had not "been dissolved."

v. *Dibbins.*[5] The principle there expressed by Chitty J.[6] is of general application, and ratification could not relate back to a date at which a valid application could not have been made. Even if full meaning were given to the subsection, it could not ratify an invalid notice such as this.

The respondent could have been served with notice of the restoration proceedings, and then the question could have been decided whether a special order should be made validating the notice.

Caplan in reply. If only internal acts were validated and all acts in relation to third parties had to be the subject of a special order under the concluding words of the subsection, a ridiculous situation would arise. It would in this case have been necessary for the court to make an order in respect of every transaction that had taken place with third parties from November, 1950, when the company was dissolved, to October, 1951, when its name was restored to the register. If that was the intention of the legislature, why was not the shorter form of words used in section 352 also used in section 353? If the position of the parties had been reversed and the respondent as tenant had made application to the company for a new lease, could it have been said that there was no valid application? Surely not.

Cur. adv. vult.

Feb. 22. Evershed M.R. This appeal raises a short question of the construction of a few words in section 353 (6) of the Companies Act, 1948: " . . . the company shall be deemed to have " continued in existence as if its name had not been struck off." The phrase is of respectable ancestry, being derived from earlier legislation relating to limited liability companies since before the beginning of the present century. But it has never been the subject of judicial interpretation, save, incidentally, in the case of *Morris* v. *Harris.*[7]

[His Lordship stated the facts and continued:] If the words which I have quoted stood alone, the question, as a matter of plain English, would appear at first sight to be simple. A limited liability company cannot act, save through agents. At the time of the making of the application the company's agents—its directors—had no authority so to act because (but only because) the company had been struck off the register and did not therefore exist. But the words I have quoted provide clearly, on the face of them, and without qualification, that "the company shall be "deemed to have continued in existence *as if* its name had not "been struck off." On the hypothesis, therefore, which the statute requires, it would appear to follow that on the hearing of the application on October 31 the respondent's objection could no longer be taken, for the ground of that objection—namely, that on July 23 the company's name had been struck off the register—had, by the terms of the statute and the order made thereunder, been taken away. But the subsection does not end with the quoted phrase. After a semicolon it continues: "and the court "may by the order give such directions and make such provisions "as seem just for placing the company and all other persons in "the same position as nearly as may be as if the name of the "company had not been struck off." The argument of the respondent is that the addition of this further and (as it is said) expository sentence substantially qualifies the effect of the phrase that precedes it, so that the latter does no more than preserve the continuance of the company's corporate existence without validating ex post facto any acts done in the company's name during the period of its temporary dissolution. In accepting this view the county court judge applied, and relied on, the speech of Lord Blanesburgh in the case of *Morris* v. *Harris*,[8] already noticed.

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[5] [1896] 2 Ch. 348.

[6] Ibid. 350.

[7] [1927] A.C. 252.

The last-named case was concerned with the effect, not of section 353 (or its predecessor), but with the predecessor of the preceding section, 352. It will, therefore, be convenient at this stage to set out the relevant parts of both section 352 and section 353. [His Lordship read section 352 (1) and the relevant subsections of section 353 and continued:] Subsection (6) first appeared in substantially the same form in section 7 of the Companies Act of 1880, the only material difference being that in the earlier Acts up to and including the Act of 1908 the words "and thereupon" appeared immediately before the general words here in question in lieu of the present phrase "and upon an office "copy of the order being delivered to the registrar for registra-"tion." The difference in the terminology between the latter part of subsection (6) of section 353 and that at the end of subsection (1) of section 352 (which was first introduced into legislation in 1907) is marked, and has been, naturally, much relied on for the company by Mr. Caplan, who has also sought support for his argument in the case of *Morris* v. *Harris*.[9] The

[8] [1927] A.C. 252, 264.

[9] [1927] A.C. 252.

difference in form and language is indeed, in my judgment, of the highest importance, and it is derived—at least in part—from the fact that the two subsections are dealing with different and distinct sets of circumstances. Section 352 (1) is applicable to cases where, under one or other of the earlier provisions of the Act (sections 279, 290 and 300) the company has been dissolved as a consequence of winding up, either compulsory or voluntary. Ex hypothesi, there can be no question of the company having since dissolution conducted trading or business operations. An obvious purpose of the subsection is to enable proper provision to be made in regard to some asset or liability newly come to light or for some other reason not taken into account in the winding up.

Section 353 (6) applies, on the other hand, where (subject to one qualification) there has been no winding up. The qualification arises from subsection (4) of the section which makes it applicable to the case of a winding up where the registrar has cause to believe that there is no liquidator acting, or that the winding up has not properly proceeded; but those special circumstances have the practical result that the qualification is really not a qualification at all; for, ex concessis, the winding up has not been completed, and the company has not, therefore, been dissolved as a consequence of liquidation. Section 353 (6) is no doubt primarily directed to the case where a formal end has been put to a company which has in practice become defunct or lapsed into inanition. But the earlier provisions of the section provide an effective sanction for failure to comply with the statutory obligations on a limited liability company as to making returns, and so on. The section is, therefore, specifically directed (and the subsection in its original form in the Act of 1880 was exclusively applicable) to cases, like the present, where a company which has failed in the performance of its statutory duties has, nevertheless, continued to trade and to transact business and, necessarily as a consequence, entered into numerous engagements with third parties.

The case of *Morris* v. *Harris* [9] (on which, as I have already said, the county court judge relied, and to which both parties before us have turned for succour) raised the question whether the words in subsection (1) of the statutory predecessor of section 352 " . . . declaring the dissolution to have been void " had, as it were, full retroactive effect so as to enable the respondent to claim against the liquidator of a resuscitated company a sum awarded to him during the period of its dissolution. The Court of Appeal (reversing the decision of Romer J.) so held; but the House of Lords by a majority of three to two came to an opposite conclusion on what must be admitted to have been a point of serious doubt. The basis of the opinion of the majority of the noble Lords was that the final words of the subsection introduced by the words "and thereupon" were expository of the preceding generalization; and that these two introductory words "and "thereupon" showed that the consequences flowing from the company's reanimation, as specified in the final words of the subsection, only took effect from the date of the order of restoration. Three passages, one from the speech of Viscount Sumner, two from the speech of Lord Blanesburgh, being those relied upon by the county court judge and by Mr. Pascoe Hayward in this court, must be cited. Lord Sumner said[10]: "The next question turns "on the language and effect of section 223 of the Companies "(Consolidation) Act, 1908" (the predecessor of section 352 of the Act of 1948). "It deals with the case of a company which has "been dissolved, and that at an ascertained or ascertainable date. ". . . Nor, again, is the phraseology of section 242" (the predecessor of the present section 353) "followed, whereby, when "the registrar has reasonable cause to believe certain things and "has taken certain action, ending in the erasure of the company's "name from the register and a publication of the fact in the "Gazette, the company thereupon 'shall be dissolved.' Under "this section, when the court intervenes by order to modify this "result, 'the company shall be deemed to have continued in "'existence, as if its name had not been struck off,' and then "the court can give directions to replace the company and all "parties affected in an 'as you were' position."

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[9] [1927] A.C. 252.

Then Lord Blanesburgh said[11]: "First of all, a company "treated as defunct by the registrar in the circumstance stated "in section 242, may by him be struck off the register under that "section, 'and the company will be dissolved.' It must be "noted that in this case the dissolution takes place without "any previous winding up, and may be effected without anyone "interested in the company in fact being aware of it. Subsec- "tion (6) of section 242 accordingly provides:" The noble Lord then sets out the subsection, which is in the same terms (so far as material) as the present subsection, and he put in italics what I have called the general words and the final sentence. He continued[11]: "My Lords, this section first appeared in company

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[10] [1927] A.C. 252, 257.

[11] Ibid. 267.

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"legislation in section 26 of the Companies Act, 1900"—this appears to be incorrect: see section 7 of the Act of 1880—"It "was before the legislature when section 223 was first enacted "in 1907. It will appear in a moment how significant is the fact "that the provisions of section 242 (6), which I have italicized, "are not repeated in section 223. That section is concerned with "a dissolution of a company following a winding up by the "court or one following a voluntary winding up, the second and "third of the events which may precede a dissolution."

Lord Blanesburgh then discussed the history of section 223 of the Act of 1908 and stated the inferences which he derived from its terms. He added finally [12]: "And now is made apparent the "reason for the difference in phraseology and effect between "section 223 and subsection (6) of section 242. A dissolution "under section 242, as I have said, is preceded by no winding "up, and the section had to envisage a dissolution which might "have taken place without the knowledge of anyone concerned "in the company. Hence the wide powers given to the court by "subsection (6). Section 223, on the other hand, is confined to "cases where the dissolution succeeds the complete winding up "of the company's affairs and cannot take effect at all except at "the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit "to make provision for validating any intermediate acts done on "behalf of such a company so dissolved."

The argument for the respondent in the present case is that the very different words of section 353 (6) must be similarly construed, with only this difference, that the final words of the subsection here in question, though similarly "expository" of the preceding generality, empower the court making the order of restoration to give quoad any particular transaction or series of transactions, appropriate directions so as to make the restoration retroactive as regards that transaction or series of transactions. I agree with Mr. Pascoe Hayward that if the effect of the subsection is not retroactive, but only enables the company from the date of the Vice-Chancellor's order to ratify acts done during the period of inanition in its name, the result does not enable the company to succeed; for, as I have already stated, the last date available to the company for making an appliction under the Leasehold Property (Temporary Provisions) Act, 1951, was July 24, 1951, and on that date (on this view of the matter) the company was non-existent and is not to be deemed to have been otherwise. On the other hand, I cannot accept the argument which Mr. Pascoe Hayward first put forward, that section 353 (6) was retroactive to the extent of validating what he called "internal" acts done in the company's name but not "external" acts, that is, acts done, or purporting to be done, in relation to third parties. The line between the two kinds of activity would not, as it seems to me, always be easy to draw; but, beyond (or perhaps, in part, because of) that difficulty, I have found it impossible to formulate the qualification that would have to be read into the general words of the subsection, or to find any satisfactory basis for holding that those general words were in this sense retroactive to a limited extent only. In my judgment, if the respondent is entitled to succeed, it must be on the ground that the (very different) wording of section 353 (6) has (in the absence of some special directions given under the power contained in the final sentence) the same effect as the language of section 352 (1), that is, that the general words serve only (in the absence of such direction) to preserve the continued corporate existence of the company, without more; so as only thereby to circumvent those calamitous consequences which would otherwise flow from the hiatus in the company's life, and which Lord Blanesburgh regarded with such horror, but did not exactly specify; for example (as I take it) that the company would have to be regarded as being for the second time incorporated.

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[12] [1927] A.C. 252, 269.

In my judgment, the wording of section 353 (6) is not apt to achieve the same result as that which flows from the language of section 352 (1). The final sentence of the former, following the semicolon, cannot, as I think, properly be regarded as "expository" of that which precedes, as is the case with the final sentence of section 352 (1), which, by the introductory "and "thereupon," denotes the consequences which, on the making of the order of restoration, flow from that fact; namely, that from the date of the order (but not before) "such proceedings may "be taken as might have been taken if the company had not "been dissolved." Section 353 (6) contains no statement at all of any such consequences; the final sentence confers a special power to add where necessary to the order of restoration special directions designed to achieve something wholly different, namely, a putting back of the clock, an achieving of what Lord Sumner called an "as-you-were position" between the company and third parties. Yet the consequences expressed in the last sentence of section 352 (1) must in any event (I assume) be deemed to flow from an order under section 353 (6). If the latter subsection was intended to achieve, in law, the same result as the former (though with the addition implicit in the power to give special directions) it seems to me (to say the least) a strange and misleading piece of draftsmanship that such widely different formulae should have been chosen. And I attach for myself considerable significance to the absence of the words "and thereupon" or any similar language.

If on the power contained in the final words of the subsection in question to insert special directions in the order of resuscitation depended the validation of all the multifarious engagements into which the dissolved company might have entered during the period of its statutory suspense (a period which might have lasted for 20 years), what would be the appropriate procedure? Prima facie, all the third parties concerned would have to be given an opportunity of making representations to the court, a proceeding which I find it well-nigh impossible to contemplate. On the other hand, some sensible content must be given to the final words of the subsection; and this problem at first seemed to me to create a difficulty in the company's way. Without, however, attempting to define the scope of the words exhaustively, Mr. Caplan was able to give instances in answer to the question put to him; during the period of the company's suspended animation, the company, as well as third parties, might well have abstained from taking those steps—a step in an action, or the exercise of some contractual right—for which the proper time might have in the meantime expired. In my judgment, the final words of the subsection can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened. More generally the final words of the subsection seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were position," which, according to the ordinary sense of those general words, is prima facie their consequence.

As appears from the passages which I have cited from the speeches in *Morris* v. *Harris*,[13] the majority of their Lordships derived considerable support for their view of the qualified effect of the general words in what is now section 352 (1), from the contrast between the language of that subsection and the language now under discussion. I find it difficult to regard such reasoning as consistent with the suggestion that the general words in section 353 (6) are as qualified as those of section 352 (1). Their Lordships seized rather on the characteristics of the latter subsection, which were different and distinct from those of the former, as deliberately intended, especially since the predecessor of section 352 first made its appearance considerably later in date than did the predecessor of section 353, to give to section 352 (or its forerunner) a more limited effect. It is true that both Lord Sumner [14] and Lord Blanesburgh [15] appear to have placed special emphasis on the final sentence of what is now subsection (6) of section 353, though Lord Blanesburgh's italics extended not only to that final sentence but also to the preceding generalization.[16] But the House was concerned only with the effect of the words now contained in section 352 (1), and was not called on to examine or precisely to construe the language which is the subject of the present appeal.

It may be said that on any view the subsection is not very happily drafted; it contemplates, for example, that the application for an order for restoration may be made by the company at a time when the company had been dissolved and is non-existent: see the note in Palmer's Company Precedents (15th ed.), Pt. 1, at page 1159. But, as I have already stated, the subsection is in terms directed to the case (like the present) when during the period, possibly of long duration, of the company's dissolution, many acts will have been done and many engagements entered into by individuals purporting to act as directors or officers of the company and in its name. In this regard the subsection operates in reference to circumstances wholly different from the circumstances relevant to an order under section 352, and such as make it at least reasonable and sensible to expect that the reanimation of the company should be retroactive in its effect.

Whatever, then, might have been the situation if the present application had come before the county court judge before the order of restoration—and in such event it is possible (though I do not so decide) that the Vice-Chancellor could, if he had thought it just after hearing the respondent, have included some special direction to his order under the final words of the subsection—it seems to me that on October 31, 1951, it was no longer open to the respondent to allege the non-existence of the company on the preceding July 23; for, by the terms of the subsection, the company had then to be deemed to have continued in existence as if its name had never in fact been struck off the register.

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[13] [1927] A.C. 252.

[14] Ibid. 257.

[15] Ibid. 266.

[16] Ibid. 267.

I have expressed my conclusion, contrary to that entertained by the county court judge, with the greater diffidence, having regard to the dissenting judgment of Jenkins L.J., which I have had the advantage of reading. But I am comforted by the support of Hodson L.J., and by the intimation of a like opinion expressed by the editors of the last two editions of Buckley on the Companies Acts: see 12th ed. (1949), at p. 705; 11th ed. (1929), at p. 596; and, according to his preface to the 11th ed., Lord Wrenbury (who participated, though he formed one of the minority in the House of Lords in *Morris* v. *Harris* [13]) was able to give some assistance in that editing.

In my judgment, the appeal should be allowed, and the case remitted accordingly to the county court judge for determination of the company's application on its merits.

JENKINS L.J. [after stating the facts, continued]:—The application which the county court judge had before him was an application purporting to have been made by the company on July 23, 1951, and was admittedly a nullity at the time when it was made, inasmuch as the company was then in a state of dissolution or, in other words, non-existent.

The statutory period within which an application for the grant of a new tenancy of the shop in question was capable of being made under the Act of 1951 having expired on July 24, 1951, and no valid application (which is as much as to say no application at all) for that purpose having been made within that period, the result, prima facie, was that thereafter the respondent became and remained free to deal with his interest in the shop as he chose, discharged once and for all from the possibility of being compelled to grant a new tenancy to the company under the relevant provisions of the Act of 1951.

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[13] [1927] A.C. 252.

It is, however, contended on the part of the company that this conclusion is displaced by the circumstance that the purported application of July 23, 1951, originally fixed for hearing on September 6, 1951, was adjourned by consent and not in fact heard by the county court judge until October 31, 1951, by which time the Vice-Chancellor had already made the order of October 15, 1951, restoring the company's name to the register.

Admittedly, if the application had been heard by the county court judge at any time before October 15, 1951, or (to be strictly accurate) at any time before the delivery to the registrar of companies for registration of an office copy of the Vice-Chancellor's order of that date, he would have had no option but to dismiss it. But it is argued by Mr. Caplan, for the company, that on the true construction of subsection (6) of section 353 of the Companies Act, 1948, the effect of the Vice-Chancellor's order when perfected by delivery for registration (as Mr. Pascoe Hayward, for the respondent, concedes it to have been before October 31, 1951) was ex post facto to convert the invalid application of July 23, 1951, into a valid application duly made by the company on the same date, and consequently into a valid application duly made by the company within the time allowed by the relevant provisions of the Act of 1951. It follows (says Mr. Caplan) that on October 31, 1951, the county court judge, by force of section 353 (6) of the Companies Act, 1948, and the order made thereunder had before him a valid application made within due time for the grant of a new tenancy, which he should have heard and determined on its merits, instead of dismissing it, as he did, on the ground of a supposed want of jurisdiction. Of course it also follows, if Mr. Caplan is right, that the respondent who under the Act of 1951 was at risk of being compelled, in derogation of his common-law rights, to grant a new tenancy if, but not unless, application was duly made on or before July 24, 1951, might in the result be compelled to do so on an application which so far from being duly made within the prescribed period, in fact was at the date of its purported making, and thereafter for more than two months beyond the expiration of the prescribed period remained, a mere nullity, and for the first time acquired validity on the making and delivery for registration of the order of October 15, 1951.

As this, to my mind, strange and startling result is said to flow expressly, or by necessary implication, from the language of section 353 (6) of the Companies Act, 1948, that subsection had better be read in full. [His Lordship then read section 353 (6) and continued:]

It will be seen (i) that the effect of the making and delivery for registration of an order under the subsection is expressed to be that the company shall be deemed to have continued in existence as if its name had not been struck off; and (ii) that the subsection goes on to provide that the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. No such directions or provisions were made by the Vice-Chancellor's order in the present case. It will further be observed that an application under the subsection may be made at any time before the expiration of 20 years from the publication in the Gazette of the striking off of the company's name from the register.

Mr. Caplan fastens on the provision that "the company shall "be deemed to have continued in existence as if its name had "not been struck off," and argues thus: If the company in the present case had continued in existence, and not been struck off, the application purporting to have been made by the company on July 23, 1951, would have been an application in fact made by the company on that date, and thus would have been a valid application duly made by the company within the time prescribed by the Act of 1951. Therefore, he submits, subsection (6) if not expressly, at all events by necessary implication, provides not merely that the company is to be deemed to have continued in existence as if its name had not been struck off, but also (as a necessary consequence of, or corollary to, that hypothesis) that the company is to be deemed further to have made, as a valid act of its own, the purported application of July 23, 1951, on the date of its purported making.

I do not think the conclusion is warranted by the premise. The purported application at the time of its making was in fact wholly invalid, because it was not, and could not be, validly made by or on behalf of the company, inasmuch as the company was then in a state of dissolution or, in other words, non-existent. True it is that the company is to be deemed to have continued in existence as if its name had not been struck off. But the hypothesis enjoined in these terms does not alter the vital circumstance that the purported application was not in fact made by or on behalf of the company. Moreover, the company could clearly have continued in existence without making any such application, and the hypothesis of its continued existence, therefore, by no means requires that it should be deemed to have done so.

I have so far stated the argument on section 353 (6) of the Companies Act, 1948, with reference to this particular case. But in general terms Mr. Caplan's submission comes to this: that whenever a company has been dissolved under the provisions of section 353, an order under subsection (6) restoring its name to the register at any distance of time up to 20 years has the automatic, indiscriminate, and retrospective effect of validating all acts and things purporting to have been made or done by or on behalf of the company during its state of dissolution without any protection for the rights of other persons. Speaking for myself, I decline to attribute any such effect to subsection (6) in the absence of clear words requiring me to do so, and for my part I can find no such words in the language of the subsection. The retrospective import of the provision that the company shall be deemed to have continued in existence as if its name had not been struck off is, to my mind, amply satisfied by the necessity of restoring the company to its original corporate status and preserving its identity as the same company and the same legal person as was previously dissolved. Otherwise, obvious difficulties as to incorporation, membership, share capital, and so forth, would arise, and if the resuscitated company was brought into being as a distinct legal entity from the dissolved one, claims by and against the resuscitated company in respect of the predissolution dealings of the dissolved company would not be maintainable.

I see no justification for holding that the notional continuation of the company's existence retrospectively brought about by the subsection does any more than restore and preserve, for reasons such as I have mentioned, the corporate existence and identity of the company. If that is right, I cannot see that it follows by necessary implication from the language used, or as a legal consequence of the hypothetical state of facts which the subsection requires to be assumed, that all acts purporting to have been done by or on behalf of the company during the period of its dissolution are to be deemed by force of the section to have been, and to be, valid acts of the company. It would be difficult indeed to define with any degree of precision the scope of this suggested validation. While in a state of dissolution the company is nonexistent. It can do nothing. It can have no directors, managers, agents or members. When an order is made for restoration of the company's name to the register, whose acts done in the meantime are to qualify for automatic validation as acts of the company? The answer, I suppose, must be the acts of any person or persons who, if the company had not been in a state of dissolution, would have had authority to bind the company in those particular matters. But how are the persons answering this hypothetical description to be identified? Dissolution for a period of perhaps as much as 20 years is envisaged. Cases may occur in which a company has been struck off the register, but all the necessary procedure as to the appointment of directors, general meetings, and so forth, is, nevertheless, carried on as if it had not been struck off. In such cases there would be no difficulty in identifying the persons, who, if the company had not been struck off, would have had power to bind it. I conceive, however, that such cases would be rare. There may also be cases in which the directors in office at the time of the striking off would, but for that event, have remained in office during the whole of the period of dissolution. Here, again, no difficulty would arise. But there must inevitably be many cases in which, during the whole or some part of the period of dissolution, the business of the defunct company was being carried on de facto by some person or persons without even a hypothetical vestige of authority, it may be to the grave detriment of pre-dissolution creditors. It would seem, therefore, that the suggested automatic validation of acts purporting to have been done by or on behalf of the company while in a state of dissolution must either extend even to acts of such de facto and wholly unauthorized managers as I have mentioned, or else be limited to the acts of persons answering a test of hypothetical authority by no means easy either to formulate or to apply. These considerations reinforce my conclusion that an order under subsection (6) does not automatically validate acts purporting to have been done by or on behalf of the company while dissolved.

Some reliance was placed in argument on the inconvenience which might result in the case of a company the business of which has in fact been carried on after its striking off if an order under subsection (6) does not have the effect of validating transactions taking place between striking off and restoration to the register. This argument (though to my mind balanced by the considerations against automatic validation to which I have already adverted) would have some force were it not for the concluding provision of subsection (6). That provision, to my mind, not only refutes the argument based on inconvenience, but also makes it reasonably plain that the provision as to the continued existence of the company does not have the validating effect contended for by Mr. Caplan, even if that effect might, as a matter of construction, have been attributed to it standing alone and divorced from the context provided by the remainder of the subsection. It will be remembered that the concluding provision of subsection (6) is to the effect that the court may, by the order restoring a company's name to the register, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. Mr. Caplan's argument, as I understand it, necessarily involves the corollary that, by force of the provision that the company is to be deemed to have continued in existence as if its name had not been struck off, the company and all other persons are automatically placed in the same position as if the name of the company had not been struck off, and that accordingly no room is left for any exercise of the discretionary jurisdiction conferred on the court for placing the company and all other persons as nearly as may be in that position. The concluding provision of the subsection thus becomes to all intents and purposes otiose and inoperative. Mr. Caplan showed considerable ingenuity in suggesting circumstances in which a useful purpose might have been served by the concluding provision in conjunction with the provision as to the continued existence of the company when given the construction and effect for which he contends. Nevertheless, he failed to satisfy me that the true construction and effect of the subsection read as a whole is not simply that an order made under it (i) operates to restore and preserve the original corporate status and identity of the company as if its name had not been struck off the register; (ii) may at the discretion of the court provide for the validation of acts purporting to have done by or on behalf of the company while it has been in a state of dissolution so far as the court considers it just so to do, having regard to the rights and interests of all parties concerned; but (iii) does not, in the absence of any such provision as is mentioned in (ii) above, have the effect of validating any such acts.

We were told that, as a matter of practice, orders made under subsection (6) do not generally contain any such directions or provisions as are mentioned in the concluding lines of the subsection. But this cannot affect the question of construction; and (it may fairly be added) it is probably true to say that in a majority of cases under subsection (6) the company is defunct de facto as well as de jure, and the order for restoration is sought by some aggrieved creditor.

We were referred to only one authority bearing at all closely on the point at issue, namely, the case in the House of Lords of *Morris* v. *Harris*.[17] In that case a company was dissolved at the conclusion of a voluntary liquidation for the purposes of reconstruction. The dissolution was later declared to have been void by an order made under section 223 of the Companies Act, 1908, which corresponds to section 352 of the present Act. The question was whether this order had the effect of making binding on the company an arbitration award pronounced against the company between the date of its dissolution and the date of the order. The House by a majority (Viscount Dunedin, Lord Sumner and Lord Blanesburgh, Lord Shaw of Dunfermline and Lord Wrenbury dissenting) held that the order did not have this effect. The case has been relied on by both parties in the present appeal, but, to my mind, it tells strongly in favour of the respondent. It turned, as I have said, on section 223 of the Act of 1908, corresponding to section 352 of the present Act, The relevant words of that section are: " . . . the court may at any " time within two years of the date of the dissolution . . . make " an order, upon such terms as the court thinks fit, declaring " the dissolution to have been void, and thereupon such pro" ceedings may be taken as might have been taken if the " company had not been dissolved."

The terms of the provision which the House had to consider were thus materially different from those of section 353 (6) of the present Act or of the corresponding section 242 (6) of the Act of 1908. But in the course of the speeches a contrast was drawn between sections 223 (1) and 242 (6) of the Act of 1908 which applies equally as between sections 352 (1) and 353 (6) of the present Act. Mr. Caplan submits that the terms in which this contrast was drawn indicate that their Lordships regarded an order under section 242 (6) of the Act of 1908 (and hence would have regarded an order under section 353 (6) of the present Act) as automatically validating acts purporting to have been done by or on behalf of a restored company while it was in a state of dissolution. I do not agree.

Lord Sumner, after referring to section 223 of the Act of 1908 and discussing its terms, said[18]: " Nor, again, is the phraseology

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[17] [1927] A.C. 252.

[18] Ibid. 257–8.

"of section 242 followed, whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, "ending in the erasure of the company's name from the register "and a publication of the fact in the Gazette, the company "thereupon 'shall be dissolved.' Under this section, when the "court intervenes by order to modify this result, 'the company "'shall be deemed to have continued in existence, as if its name "'had not been struck off,' and then the court can give directions to replace the company and all parties affected in an 'as "'you were' position. The words 'to have been void,' in "section 223, appear, it is true, so far as they go, to have some "retrospective effect, and tend to some extent to support the "respondent's argument. On the other hand, the remaining "words, which define the order, point rather to a declaration "removing a bar to such action as might otherwise have been "taken, than to one validating past proceedings, taken since "the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, 'and thereupon such "'proceedings may be taken, as might have been taken if the "'company had not been dissolved,' seem to me to point "conclusively in the same direction. They describe an "authority given to the parties concerned to do, 'thereupon' "and accordingly thereafter, things which they might have done "but obviously had not done theretofore, and, but for the order "could not have done after the dissolution. I think these words "do not affect the validity or the contrary of steps taken during "that interval. They must still depend on the facts existing and "the rights arising before and independently of the order."

Then Lord Blanesburgh said [19]: "My Lords, the Companies "(Consolidation) Act, 1908, makes the dissolution of one of its "companies possible in three different events. First of all, a "company treated as defunct by the registrar in the circumstance stated in section 242, may by him be struck off the "register under that section, 'and the company will be dis-"'solved.' It must be noted that in this case the dissolution "takes place without any previous winding up and may be "effected without any one interested in the company in fact "being aware of it. Subsection (6) of section 242 accordingly "provides," and his Lordship then read the section, italicizing its terms from this point, "'*and thereupon the company shall* "'*be deemed to have continued in existence as if its name had*

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[19] [1927] A.C. 252, 267.

" '*not been struck off; and the court may by the order give such*" '*directions and make such provisions as seem just for placing*" '*the company and all other persons in the same position as*" '*nearly may be as if the name of the company had not*" '*been struck off.*' My Lords, this section first appeared in " company legislation in section 26 of the Companies Act, 1900.[20] " It was before the legislature when section 223 was first enacted " in 1907. It will appear in a moment how significant is the fact " that the provisions of section 242 (6), which I have italicized, " are not repeated in section 223."

Then Lord Blanesburgh said[21]: " In these circumstances, " I cannot myself doubt that both the words of section 223 " empowering the court to make an order 'declaring the dis-" 'solution to have been void,' and the following words exposi-" tory of the result, 'and thereupon such proceedings may be " 'taken as might have been taken if the company had not been " 'dissolved,' were in each case designedly chosen to produce " the precise result which my noble and learned friend has " attributed to them. It is true that a declaratory order under " the section unqualified in terms does, and it was in my judg-" ment essential, if many difficulties which readily occur to the " mind were to be avoided, that such an order should have the " effect of restoring to the revived company its corporate existence " as from the very moment of the dissolution thereby declared " 'to have been void.' But the expository words which follow " carefully and, as I think, advisedly refrain from adding that " such an order is to have the effect of restoring to the company " from the same moment, not its corporate existence only, but " its corporate activity also. On the contrary, these expository " words import, as I think, that it is only after the order has " been made—it is 'thereupon' but not before—that any active " consequences are to ensue. I think, my Lords, that the terms " in which these consequences are described are exhaustive and " emphatic. They are intended to show that an order under the " section made, it may be, as long as two years after a dissolution " which up to that moment was completely effective, is not at " once and as of course to ratify acts done during the interval, " which, if done at all, must necessarily have been acts of mere " usurpation, by a liquidator or other pretended agent with no " office knowingly done on behalf of a company which had no " existence. On consideration, it appears, I think, clear that

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[20] But see s. 7 of the Act of 1880.

[21] [1927] A.C. 252, 268–9.

"automatically to validate such acts as being the acts of a duly "constituted officer on behalf of a duly incorporated company "might involve consequences too disastrous to be even envisaged. "These are avoided by the terms of the section. The company "is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, "asleep and powerless until the order is made which declares "the dissolution to have been void. Then, and only then, is the "company restored to activity. And now is made apparent the "reason for the difference in phraseology and effect between "section 223 and subsection (6) of section 242. A dissolution "under section 242, as I have said, is preceded by no winding up, "and the section had to envisage a dissolution which might have "taken place without the knowledge of any one concerned in the "company. Hence the wide powers given to the court by sub-"section (6). Section 223, on the other hand, is confined to "cases where the dissolution succeeds the complete winding up "of the company's affairs and cannot take effect at all except at "the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit "to make provision for validating any intermediate acts done on "behalf of such a company so dissolved."

It seems to me reasonably plain that their Lordships were not in these passages treating an order under section 242 (6) of the Act of 1908 as having the effect of automatically validating acts done while the restored company was in a state of dissolution, but were contrasting the presence in section 242 (6) of a power for the court (as Lord Sumner put it) "to replace the company and "all parties affected in an 'as you were' position"[22] with the absence of any such power in section 223 (1). In view of what Lord Blanesburgh said[23] about the possibly disastrous consequences of automatic ratification I cannot but think he would have made some comment on the automatic ratification produced by an order under section 242 (6) if he had thought such an order would produce that result. Further, I think his contrast[24] between "corporate existence" and "corporate activity" is no less applicable to section 242 (6) (now section 353 (6)). I should add that Lord Wrenbury in his dissenting judgment[25] uses language which by no means indicates that he would not have taken a different view on the entirely different facts of the present case.

[22] [1927] A.C. 252, 257.

[23] Ibid. 269.

[24] Ibid. 268.

[25] Ibid. 263.

Even if, contrary to my view, an order under section 353 (6) does automatically validate acts purporting to have been done by or on behalf of the company while dissolved, I think it would be wrong in principle to regard such validation as extending to making retrospectively effective an application such as the one here in question, which could not have been effectively made by the company at the date of the order of restoration, because the time allowed for making it had by then already expired. In other words, I think the effect of any statutory ratification brought about by section 353 (6) must at all events be limited by the principle stated in *Dibbins* v. *Dibbins*,[26] which should be applied with reference to the facts as they stand at the date when the order of restoration is perfected by delivery for registration.

For these reasons I would dismiss the appeal.

HODSON L.J. stated the facts briefly and continued:—On October 31, 1951, the county court judge held that there was accordingly no effective application before the court, notwithstanding that on October 15, 1951, before the hearing and after the making of the application, the court had made an order under section 353 (6) of the Act, of which the material parts are: "This "court doth order that the name of the above-named Tyman's, "Limited, be restored to the Register of Companies. And it is "ordered that upon an office copy of this order being delivered "to the Registrar of Companies the said Tyman's, Limited, is to "be deemed to have continued in existence as if its name had "never been struck off."

It is admitted that the condition of delivery of the order to the Registrar of Companies is to be taken to have been complied with, and the sole question is whether the application of July 23, admittedly a nullity at the time it was made, has been validated by the order, having regard to the language of the subsection. [His Lordship read section 353 (6) and continued:] It is conceded that the words "the company shall be deemed to have "continued in existence as if its name had not been struck off" have some retroactive effect, but the respondent contends that their force is insufficient to bring to life such an application as was made by the applicants to the county court.

It is necessary to compare section 352 (1) with section 353 (6). [His Lordship read section 352 (1) and continued:] The last words of this section are markedly different from the words here to be considered; in particular the words "thereupon such proceedings may be taken as might have been taken if the company "had not been dissolved" are to be noticed. The predecessor of section 352, namely, section 223 of the Companies (Consolidation) Act, 1908, was considered by the House of Lords in *Morris* v. *Harris*.[27] The House by a majority held that the section did not validate proceedings during the interval between dissolution and avoidance under that section. Lord Sumner said[28]: "The next "question turns on the language and effect of section 223 of the "Companies (Consolidation) Act, 1908. It deals with the case of "a company which has been dissolved, and that at an ascertained "or ascertainable date. It provides for an order, which it empowers a court to make in all such cases, on such terms as the "court may think fit (and therefore also without terms, if the "court so thinks fit) 'declaring the dissolution to have been void.' "Pausing here, I remark that the order is not expressed to be "one setting anything aside or declaring that the dissolution is "to be deemed not to have taken place and thus reversing the "actual language of section 195, or declaring the dissolution to "be void. Nor, again, is the phraseology of section 242 followed, "whereby, when the registrar has reasonable cause to believe "certain things and has taken certain action, ending in the "erasure of the company's name from the register and a publication of the fact in the Gazette, the company thereupon 'shall "'be dissolved.' Under this section, when the court intervenes "by order to modify this result, 'the company shall be deemed "'to have continued in existence, as if its name had not been "'struck off,' and then the court can give directions to replace "the company and all parties affected in an 'as you were' "position. The words 'to have been void,' in section 223, "appear, it is true, so far as they go, to have some retrospective "effect, and tend to some extent to support the respondent's "argument. On the other hand, the remaining words, which "define the order, point rather to a declaration removing a bar "to such action as might otherwise have been taken, than to one "validating past proceedings, taken since the dissolution through "ignorance or disregard of it and consequently invalid. The "remaining words, 'and thereupon such proceedings may be "'taken as might have been taken if the company had not been "'dissolved,' seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned

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[26] [1896] 2 Ch. 348.

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[27] [1927] A.C. 252.

[28] Ibid. 257–8.

"to do, 'thereupon' and accordingly thereafter, things which "they might have done but obviously had not done theretofore, "and, but for the order, could not have done after the dissolution. "I think these words do not affect the validity or the contrary "of steps taken during that interval. They must still depend on "the facts existing and the rights arising before and independently "of the order." Section 242 of the Act of 1908 is the predecessor of section 353 of the present Act.

The respondent relies on the words of Lord Sumner,[28] "and "then the court can give directions to replace the company and "all parties affected in an 'as you were' position," as tending to support the view that an "as you were" position is not created unless the court gives special directions under powers conferred by the last four lines of subsection (6). Lord Blanesburgh also drew attention to the difference in the language of the two sections, and pointed out that the section which corresponds to section 352 had to do with companies which had been wound up either compulsorily or voluntarily. These are dealt with by sections 279, 290 and 300 of the present Act. The section which corresponds to section 353, on the other hand, dealt with dissolution when there had been no winding up, which might have taken place without the knowledge of anyone concerned in the company. Lord Blanesburgh did not consider the precise effect of an order under the last-mentioned section, but, in my opinion, says nothing inconsistent with the view that an order under what is now section 353 (6) brings about an "as you were" position as contended by the company. Both of their Lordships were concerned to show that on a comparison of the two sections of the Act of 1908 the retroactive effect of an order under section 223 was less than that of an order which might be made under section 242, but went no further in considering section 242 than was necessary for the purpose of construing section 223.

Some difficulty is presented by the last four lines of section 353 (6) of the Act of 1948, which might seem to be mere surplusage if the preceding words are completely retroactive. The respondent accordingly contends that the retroactive effect of the earlier part of the subsection is confined to internal acts of the company, leaving external matters in the shape of the company's relationship with third parties unaffected in the absence of a special order under the last part of the section. He suggests other lines of demarcation, one between acts done in the ordinary course of business and acts done outside that course, and another between acts which a company can ratify and those which it cannot ratify in accordance with the ordinary laws of agency. These various lines of demarcation cannot be said to be based on any words contained in the subsection itself, although the distinction between internal and external activity finds some support from the language of Lord Blanesburgh in *Morris* v. *Harris*,[29] when he drew a distinction between the corporate existence and the corporate activity of the company in considering the effect of an order under what is now section 352.

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[28] [1927] A.C. 252, 257–8.

For my part, I think the words of section 353 (6) are clearly designed to produce an " as you were " position, and think that the latter part of the subsection is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost. An example of this would be a case where a company had lost an opportunity of obtaining a concession or renewing a lease during the interval between its dissolution and an order under the subsection. A provision in the order could deal with such a case. That the last four lines of the subsection do not cut down the retroactive effect of that which precedes them is, to my mind, indicated by the introductory words " and the court may by the order." The directions and provisions to be made by the order would naturally be supposed to make good what had previously been stated, namely, that the company should be deemed to have continued in existence as if the name had not been struck off.

Finally, there is in section 353 (6) no language comparable with the words " thereupon such proceedings may be taken," etc., in section 352. In my judgment, the appeal should be allowed and the matter referred back to the county court judge to hear the application on its merits.

Appeal allowed.

Solicitors: *Lawrence Barnett & Co.; Jaques & Co., for T. J. Smith & Son, Liverpool.*

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[29] [1927] A.C. 252, 268.

BENN *v.* KAMM & CO. LD.

[1950 B. No. 4017.]

C. A.

1952
Mar. 13, 14.

Somervell, Denning and Romer L.JJ.

Factory—Personal injuries—Horizontal milling machine—Statutory duty of occupiers—Breach—Horizontal Milling Machine Regulations, 1928 (*S.R. & O. No.* 548, *as amended by* 1934, *No.* 207) *reg.* 3—*Factory and Workshops Act,* 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 79—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14.

Although special regulations made by the Secretary of State under section 60 of the Factories Act, 1937, with respect to the fencing of specified parts of a particular machine may modify the duties imposed by section 14 of the Act on the occupier of the factory with respect to the fencing of those parts, they do not affect his duty to comply with the provisions of that section as regards the fencing of other dangerous parts of the machine with which the special regulations do not purport to deal.

The plaintiff was injured by a dangerous and unfenced part of a horizontal milling machine, to which the Horizontal Milling Machine Regulations, 1928, applied. Regulation 3 contained provisions concerning the fencing of the cutters of the machine, but made no reference to the fencing of the dangerous part by which the plaintiff was injured:—

Held, that regulation 3 did not define exhaustively the duty of the occupier of the factory to fence horizontal machines and the defendants were in breach of section 14 of the Act and the plaintiff was entitled to recover.

Miller v. *William Boothman & Sons Ld.* [1944] K.B. 337 considered and distinguished.

APPEAL from Parker J.

The plaintiff Benn claimed damages for personal injuries against his employers. He was, at the time of the accident, employed in the defendants' factory as a charge-hand, and had been summoned by an apprentice, who was operating a horizontal milling machine, to adjust the machine. The main structure of the machine consists of a moving platform on which pieces of metal are placed to be operated on by a circular saw. The platform proceeds under hydraulic pressure, electrically operated, either from left to right or right to left, and while that is happening the saw operates on the pieces of metal. The plaintiff, having told the apprentice to switch off the power, and thinking he had done so, put his fingers round a stop at the side of the platform for the purpose of adjustment and his index finger was so badly crushed that the top joint had to be amputated. He claimed that the defendants had been guilty of a breach of section 14 of the Factories Act, 1937.[1] For the defendants it was contended that the Horizontal Milling Machine Regulations, 1928, made in pursuance of section 79 of the Factory and Workshops Act, 1901, and continuing in force and deemed to be made under section 60 of the Factories Act, 1937, by virtue of section 159 of that Act,[2] defined exhaustively the duty of an occupier in fencing horizontal milling machines and that having fenced the cutter they were not in breach of the statute. The judge accepted this contention and dismissed the plaintiff's claim. The plaintiff appealed.

F. D. McIntyre for the plaintiff.
Marven Everett for the defendants.

SOMERVELL L.J. stated the facts and continued:—The learned judge, having considered the evidence, dealt with the position under section 14, which is the relevant section of the Factories Act, 1937. He came to the conclusion that it would be perfectly possible to devise and fit some guard over what is really admitted on all sides—or nearly admitted—to be a dangerous part of the machine, namely, where this stop comes in front of the base of the platform. Then he refers to the details of the guards which were suggested and the evidence of people with technical knowledge on each side. He summarized it in this way: "He," that is, the defendants' expert, "instanced difficulties in fixing, but "I am quite satisfied that if anybody was determined to have a "device of that sort there is nothing impossible in doing so, and "it seems to me it would be a precautionary device which would "add not only to the safety of the operator but to the safety of "the setter." It is, I think, plain that apart from the point with which I am about to deal, and which was the main point argued in this court, the learned judge would have come to the conclusion that there was here a breach of section 14.

The point taken was similar to one which came before this court for the first time in 1944 in *Miller* v. *William Boothman &*

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[1] Factories Act, 1937, s. 14: "Every dangerous part of any "machinery . . . shall be securely "fenced unless it is in such a posi- "tion or of such construction as to "be as safe to every person employed "or working on the premises as it "would be if securely fenced. . . ."

[2] Horizontal Milling Machine Regulations, 1928, reg. 3: "The "cutter or cutters of every horizontal "milling machine shall be fenced by "a strong guard, properly adjusted "to the work, which shall enclose the "whole cutting surface except such "part as is necessarily exposed for "the milling operations."

Sons Ld.[3] That case dealt with a circular saw. There had been a decision by Salter J. in *Davies* v. *Owen*[4] to the effect that the application of section 14 to a circular saw involved that it could not be worked at all. If securely fenced, access could not be got to it in order to enable it to cut whatever it was intended to cut. That was the broad result of that decision of Salter J. Regulations had been made in 1922, the Woodworking Machinery Regulations, and they provided for the guard and they provided that it was to extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw. The question in the case was whether that regulation modified by diminishing the effect of section 14. There was a complication in that, and in a later case, namely, that the regulations had been made under the Act of 1901 but were deemed to be made under the Act of 1937 by a section of that latter Act. We are not concerned with that except in so far as this court held in *Miller's* case[5] that regulations made under the earlier Act, continued in force by the provision which I have referred to under the later Act, could modify the effect of any relevant sections as they appear in the later Act.

The judgment of the court was read by Goddard L.J. He referred to the decision of Salter J. and to the importance of there being a regulation-making power, and he later held that there was power to modify what I may call the rigor of the general words of the Act. Otherwise the result of those general words would in the case of circular saws make the necessary machinery for the industry of the country wholly unworkable. He said[6]: "In our opinion, these regulations must be regarded "as modifying the provisions of section 14 in respect of these "machines and of substituting the prescribed guarding and "fencing for the absolutely secure fencing which the section "would otherwise require." He pointed out that if that were not the result, the regulations might be in the nature of a trap; that there was a document issued by the Secretary of State, the occupier of a factory followed it, and still it might be found that he was guilty of an offence. That principle was applied in this court in *Nicholls* v. *F. Austin* (*Leyton*) *Ld.*,[7] which again dealt with the Woodworking Machinery Regulations as applicable to a circular saw. In that case what had happened was that a piece of wood shot out from the machine and did the injury. It was not the more normal case where the fingers of the operator got injured by the saw. This court decided on the basis of the principle in *Miller* v. *William Boothman & Sons.*[8] It went to the House of Lords, where it was decided on another ground, which I need not trouble to state, the correctness of the decision in *Miller* v. *William Boothman & Sons*[8] being reserved and not dealt with, and so it continued to bind this court.

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[3] [1944] K.B. 337.
[4] [1919] 2 K.B. 39, 41.
[5] [1944] K.B. 337.
[6] Ibid. 341.
[7] [1945] K.B. 50.

The same point came before this court in *Franklin* v. *Gramophone Co. Ld.*[9] There the regulations were regulations dealing with the grinding of metal. There was an exemption in those regulations that nothing in them was to apply to "any "processes in or incidental to the sharpening of tools except as "regards any part of the factory in which one or more persons "are wholly or mainly employed in such work." The first issue in the case was whether the place where the plaintiff was was within the exception, and also whether it was a place in which one or more persons were wholly or mainly employed in such work. I only mention that to show that the argument turned on matters which were expressly dealt with (as, in my opinion, in the circular saw case) by the regulations. I do not myself think that there is any real assistance in those cases on the point which has arisen here. They show, of course, that this court will proceed on the basis that regulations can modify the liabilities and duties imposed by the Act. But the point which arises here is whether these regulations relieve the defendants of the duty which the judge, I think, would clearly have found, and I find, they would have been under, having regard to the general words of section 14, if no regulation had been made.

I will therefore refer to the regulations, and the argument can be stated very shortly. There are regulations called the Horizontal Milling Machine Regulations, 1928, made in pursuance of section 79 of the Factory and Workshops Act, 1901, continued, as I have said, under the Act of 1937: "It shall be "the duty of the occupier to observe Part 1 of these regulations" and "It shall be the duty of every person employed to observe "Part 2 of these regulations." When one comes to Part 1 the regulations deal with various matters other than fencing. In paragraph 1 they deal with maintaining in good order, and so on, the floor immediately surrounding the machine. That is a matter which is dealt with, as far as the Act is concerned, in sections 25 and 26. Then there is a paragraph which deals with sufficient and suitable lighting. Then we come to paragraph 3, and that is the one on the construction of which this case turns. [His Lordship read the regulation.] There are exemptions which come before Part 1, by way of anticipation of it, and they started in this way: "Nothing in regulation 3 shall apply to any milling "cutter used on" and then an example is given, "or when "used for," and other examples are given. Then there is a proviso: "Provided that these exemptions shall not prejudice "the application of section 10 of the Factory and Workshops "Act, 1901, in regard to fencing of such machinery." That shows that so far as the exemptions are concerned the general provisions of section 10 of the Act apply.

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[8] [1944] K.B. 337.

[9] [1948] 1 K.B. 542.

On behalf of the defendants—and this is the view accepted by the learned judge—Mr. Marven Everett submits that these regulations define exhaustively the duty of an occupier qua fencing horizontal milling machines. Applying, therefore, *Miller* v. *William Boothman & Sons Ld.*[10] and the other cases, if an occupier quoad the cutter complies with this he will have complied with all that the law requires, and it could not be said that there were some further precautions to be derived from the general words of the section. Mr. McIntyre, for the plaintiff, submits that they do not exhaustively define the occupier's duty, and that so far as fencing is concerned they define and regulate only the fencing that is necessary for the cutter, and that if, as here, there is on a milling machine, as there is here found to be, a dangerous part other than the cutter, that is a subject matter with which the regulations do not purport to deal and the general duty under section 14 is applicable. I have come to the conclusion that that is right. I think that if it had been intended by the regulation to define exhaustively the fencing duties in respect of all parts of these machines, different words would have been used.

Mr. Everett, for the defendant, admitted that notwithstanding the regulation, if a machine of this kind contained, as it is suggested it might, a flywheel within section 12, or transmission machinery within section 13, the duties under those sections remained. I cannot see why, if there is what I may call a separate subject of danger which falls within the general words of section 14, the duty under that section should be regarded as removed by the words of this regulation. In fact, I think they are inapt to do so. For these reasons, in my opinion, this appeal should succeed. It must, in the first resort, be a question of the construction of the regulations. If, on the face of them, they exhaustively cover the subject matter, then there will be no statutory liability. The learned judge adopted the wider construction, but in that respect I have come to a different conclusion, which I have stated. The question of the common law liability does not arise, therefore, but it was dealt with in argument and I see no reason to dissent from the learned judge's conclusion that there was no breach at common law for the reasons which he gave.

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[10] [1944] K.B. 337.

[The learned Lord Justice then considered the evidence as to contributory negligence on the part of the plaintiff, and continued:] I agree with the learned judge that he did contribute to his own accident, and that, therefore, he must bear a part of the damage. I have done my best to consider the matter from the point of view of both defendant and plaintiff, and I think it is fair to remember a point which the judge emphasized on common law negligence, that no one had ever heard of an accident of this kind before. Doing the best I can I think the damages should be borne equally, 50 per cent. each by the plaintiff and defendants. I think on the basis of the figure found by the learned judge that would involve judgment for £817 10s. 0d. To that extent I think the appeal should be allowed.

DENNING L.J. I agree. I am confirmed in the view that we should allow this appeal because Parker J. would have himself decided in favour of the plaintiff but for the fact that he felt himself bound by authority. He said "it seems an extra-"ordinary proposition that because the regulations have said "that dangerous part A shall be guarded in a particular way, "there is no obligation to guard dangerous parts B, C, D and "E." Now that we have had the benefit of full argument on the cases, I think that proposition is no part of the law. It seems to me that when the regulations say, that a particular dangerous part is to be guarded in a particular way, then the occupier satisfies his statutory obligations in regard to that part by guarding it in that way; but the occupier remains under his ordinary statutory obligations in regard to other dangerous parts.

In this case the regulations prescribe the way in which one particular danger is to be met, namely, the danger from the cutter of a milling machine, but the regulations do not prescribe anything about any other dangerous parts of the machine. The obligation to provide safeguards for those dangerous parts is to be found in the Act itself, and in particular in section 14. That is an absolute obligation which the occupier has not fulfilled. He is, of course, not absolved from responsibility by the fact that the factory inspector never required him to fence those parts. Nor do I think we should pay any regard to that fact when assessing the share of responsibility which the parties should bear. A breach of statutory duty having been proved, which would give a careful plaintiff a cause of action for his full damages, then the only question under the Contributory Negligence Act is by what amount the full figure should be reduced, having regard to this plaintiff's share in the responsibility for the damages. The judge, on reviewing the facts, felt bound to say that the plaintiff did an act which was, to say the least, extremely rash. In the circumstances, I agree with my Lord that the proper proportions are half and half. I agree that we should allow the appeal accordingly.

Romer L.J. I also agree. As we are differing from the judge on the question of the liability of the employers I would just add a few words on the question of the regulations and the liability under section 14. I add them because, for myself, I was rather attracted by the way in which Mr. Everett put his case. He pointed to section 79 of the Act of 1901 and said that that was the section under which these particular regulations were made in 1928. That section provides: "Where the Secretary of State "is satisfied that any manufacture, machinery," and so on, "is "dangerous . . . he may certify that manufacture, machinery, "plant," etc., "to be dangerous; and thereupon the Secretary "of State may, subject to the provisions of this Act, make such "regulations as appear to him to be reasonably practicable and "to meet the necessity of the case." That provision is repeated in section 60 of the Act of 1937, but deletes the requirement as to certifying. Mr. Everett presents the matter in this way: that the section was dealing with machinery as a unit, the function of the Secretary of State is to pay regard to a unit of machinery, and, if he contemplates that it is dangerous machinery then he may give a certificate, and then he has to diagnose the dangers and make regulations to meet them. Thus, says Mr. Everett, you arrive by means of a series of regulations at a code which covers all the dangers of the unit. He suggests that that is just what has happened in this case.

It is plain that a set of regulations may be so comprehensive as to prescribe a safeguard for all known dangers and, if so, they would amount to a complete code which, on the authorities to which my Lord has referred, would supersede section 14 or such other section as might be relevant. But it is always a question, I think, whether that has or has not been done. I am of opinion on the whole that on the construction of section 79 (or section 60 of the later Act) it is open to the Minister to deal with some specific dangers and not others. He does not have, as Mr. Everett suggested, to exercise his functions by taking a piece of machinery as a unit, consider all its dangers, and then prescribe remedies and safeguards to meet them. In the present case he has, as I see it, merely selected from the particular machinery one dangerous feature and has made regulations to deal with that feature, namely, the cutters. In so far as the regulations prescribe safeguards for the cutters, then, on the authorities, those regulations are sufficient. But in so far as they do not deal with all the dangers then those other dangers, as I think, remain subject to section 14 and the obligation of the employer in relation to them continues.

Consequently, as this piece of apparatus was undoubtedly dangerous in a way that was not mentioned in the regulations, the employer, as I think, was still liable under section 14 in relation to it, and, consequently, the regulations afford no answer to this claim. I do not, for myself, think that the cases which were cited really carry the matter very far, because the point never actually arose in any of them; and although some of the language which is to be found in them appears to be wide enough to afford some support for the contrary view, they have to be read in relation to the facts before the court, and so read I do not think they really provide any assistance. They certainly do not compel this court to arrive at a contrary view to that which has been indicated. For the rest, I entirely agree with what has been said, including the apportionment of 50 per cent.

Appeal allowed.

Solicitors: *Bryan O'Connor & Co.; Stanley & Co.*

A. W. G.

NORRIS *v.* SYNDIC MANUFACTURING CO.

[1951 N. 262.]

C. A.

1952
March 6,
7, 21.

Somervell,
Denning and
Romer L.JJ.

Factory—Statutory duty—Duty of workman to use safety appliance—Dangerous machinery—Fencing—Provision of safety guard by employer—Omission of workman to use guard—Breach of statutory duty by workman—Contributory negligence—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16, 119.

The plaintiff workman, a tool setter in the employ of the defendants, while engaged in testing a power press after adjustment, inadvertently started the machine and the guard having been removed he sustained such injuries to his right hand that he lost the top joints of three fingers. He asserted, and it was so found by the trial judge, that the defendants had acquiesced in his working with the guard off, and had instructed him to replace it "after testing and before operation." The employers, however, never told the plaintiff not to use the guard. The trial judge, holding that the defendants were in breach of their statutory duty under sections 14 and 16 of the Factories Act, 1937, and had failed to provide a safe system of working, acquitted the plaintiff of a breach of section 119 of the Act, or of contributory negligence, and awarded him damages. On appeal by the defendants:—

Held, that the words of section 119 imposed an absolute duty on the workman to use the guard once it was provided and was available for use, and the fact that the employers had demonstrated his work to him without the guard and had acquiesced in his so doing, although relevant in considering whether it was a proper case for a prosecution, and in determining whether the workman should bear part of the damages, did not enable it to be said that in the circumstances of the case no offence had been committed by him. The workman was in breach of section 119 and therefore the damages awarded must be reduced by one-fifth.

Dictum of du Parcq L.J. in *Gibby* v. *East Grinstead Gas & Water Co.* [1944] 1 All E.R. 358, 363 considered.

Per Denning L.J.: If the employer encourages the man not to use the guard, that aggravates his responsibility and lessens that of the man, but it cannot take away his responsibility altogether. If the Act intends the workman to use the guard then use it he must, no matter what the employer thinks or even what he says or does, so long as he does not actually forbid the man to use it.

Per Romer L.J.: I am unable to find any sufficient warrant for the view that an employer does not provide a safety device within the meaning of section 119 unless he tells the workmen concerned that they must use it. The primary meaning of the word "provide" is to "furnish" or "supply" and accordingly on the plain, ordinary interpretation of the section a workman's statutory obligation is to use safety devices which are furnished or supplied for his use by his employers.

C. A.
1952

NORRIS
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APPEAL from Devlin J.

The plaintiff was employed as a tool setter in the metal toy factory of the defendants, and on the material day was engaged in adjusting a power press into which metal strips were fed and then stamped into the required shape. Pressure by foot on a pedal caused the press to descend by electric power. Admittedly the press had to be securely fenced under section 14 of the Factories Act, 1937, and the fencing maintained and kept in position under section 16 of the Act. The defendants had provided a proper guard but the plaintiff, in order to carry out his work, had removed the guard, and he asserted in evidence that when he was initiated into his work as a tool setter he was told by his employers to replace the guard after testing and before operations. He also stated that he had seen his employers testing and taking samples without replacing the guard. It further appeared from the evidence that, when testing, a number of samples might have to be taken, and to replace the guard every time a sample pressing was taken would involve considerable delay.

On the day in question the plaintiff, when taking sample pressings, by some inadvertence pressed the pedal when his right hand was within the area of the press, and he sustained such injuries that the top joints of three fingers had to be amputated. He claimed damages for personal injuries.

Devlin J. awarded the plaintiff £1,500 damages. He held that the defendants were in breach of their statutory duty under sections 14 and 16 of the Factories Act, 1937, and had also failed to provide a safe system of working. He acquitted the plaintiff of contributory negligence or of a breach of section 119 of the Act.[1]

The defendants appealed.

Beney Q.C. and *Martin Jukes* for the defendants. The questions raised by the appeal are: (1) Was the plaintiff guilty of a breach of section 119 of the Factories Act, 1937, and also of failure to take reasonable care for his own safety? (2) Was the award of damages so excessive that it ought not to stand? (3) Whatever is the right figure, does it fall to be reduced by reason of the Law Reform (Contributory Negligence) Act, 1945? It is submitted that the answer to the first question is "Yes."

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[1] Factories Act, 1937, s. 119: "Where any means or appliance for "securing . . . safety is provided "for the use of any such person under "this Act, he shall use the means or "appliance."

Under the Act a guard not only has to be provided but the workman has to use it. The mere fact that a practice has grown up, with the sanction or acquiescence of the employers, not to use the guard, when testing, does not absolve the workman from the obligation placed on him by the statute. Otherwise it would be reading section 119 as affected by the system of working. The plaintiff made no secret of the fact that he was doing a risky thing in testing with the guard off. That he was asking for trouble is proved by his own evidence. He was therefore guilty of common law negligence. The judge said that "provided" meant "provided in a manner which showed the employee that "he was intended to use it." What the judge was saying was that it was not sufficient to provide the machine with the necessary guards; but that, in order to put the duty on the workman under section 119, the employer had also to say on what occasions he was to use it. The judge is extending what was laid down by Greer L.J. in *Murray* v. *Schwachman Ld.*,[2] viz., that where the workman is told by his employer that he is not to use a guard which has been provided, the result is the same as if the guard had never been provided. The reference made to section 119 by du Parcq L.J. in *Gibby* v. *East Grinstead Gas and Water Co.*[3] does not throw much light on the present case. In *Finch* v. *Telegraph Construction Co.*[4] it was held that goggles had not been provided because the workman did not know where they were kept. In the present case the defendants are not taking advantage of their own wrong. The plaintiff knew from the beginning just as much as the defendants. He took the risk, and it is submitted that his action in taking that risk makes him partly responsible for his own injury. *Cakebread* v. *Hopping Bros. (Whetstone) Ld.*[5] covers this case. As to the assessment of damages, the plaintiff has suffered no loss of earnings, and any such loss in the future is entirely speculative. [*Beal* v. *S. E. Gomme Ld.*[6]; *Barcock* v. *Brighton Corporation*,[7] and *Clifford* v. *Challens*[8] were also referred to.]

Nelson Q.C. and *Ronald Hopkins* for the plaintiff. If the facts are properly construed the decision of the judge was clearly right. When a workman enters into the service of employers it is plainly the duty of the latter to tell the workman what they want him to do, and to instruct him in the doing of it. They

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[2] [1938] 1 K.B. 130.

[3] [1944] 1 All E.R. 358.

[4] [1949] 1 All E.R. 452.

[5] [1947] K.B. 641.

[6] (1949) 65 T.L.R. 543.

[7] [1949] 1 K.B. 339.

[8] [1951] 1 K.B. 495.

C. A.
1952

Norris v. Syndic Manufacturing Co.

must be deemed to know their business, and the judge has found that when setting up the machine they instructed the workman to do exactly as they did. It is immaterial whether or not the plaintiff appreciated there was some risk. The defendants are blaming the workman for their own failure properly to instruct him in the work he was to do. They are seeking to cast upon the workman their own duty to provide a safe system of work. A workman cannot be accused of negligence or contributory negligence if he is merely doing what his employer has employed and instructed him to do. That is the answer to the charge of negligence at common law. Section 119 of the Factories Act only creates a duty on the part of the person for whom the guard is provided. The guard was provided for the operator of the machine and not for the plaintiff, who was a tool setter. It is not enough for the employer to provide the guard and to leave the employee to decide for himself whether or not he will use the appliance. The section must be construed strictly. It expressly provides that the duty on the employee arises only in respect of a piece of machinery provided for his use, and it must be proved whether it was provided for his use. The present case is covered by the decision in *Murray* v. *Schwachman Ld.*[9]

Cur. adv. vult.

March 21. The following judgments were read:—

Somervell L.J. stated the facts and continued:—It is not disputed that under the Act the fencing should have been in position when the plaintiff was taking samples. I will read the paragraph of the judge's judgment in which he construed and applied section 119: "In my judgment, an article is not "'provided' within the meaning of the Acts merely by supplying "it and making it available. When the term is considered in "the light of the policy of the Acts, I think that the article must "be provided in a manner which makes it clear to the workman "that he is expected to use it. That will not always involve an "express oral direction; the purpose for which an article is "supplied may often be too obvious for words. It is not so in "this case. When the plaintiff was initiated into the use of "the guard he was told to replace it after testing, and before "operation was begun. That would convey to him (and the

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[9] [1938] 1 K.B. 130.

"subsequent attitude of the defendants would amply confirm it) "that the guard was intended for use in operation only, and that "he was not expected to use it for testing. In these circum-"stances I do not think that the plaintiff broke section 119 "because he did not use the guard for a purpose other than that "for which it was provided."

If that construction is right I would agree with the conclusion. Mr. Beney submits it is wrong, and I have, with respect, come to that conclusion. The plaintiff here, of course, knew all about the appliance. He would have just removed it. It was at hand and available.

I will deal with the authorities. In *Murray* v. *Schwachman Ld.*[10] although there was a fencing or guard on the premises, the plaintiff had been forbidden to use it. It was held that the result was the same as if it had never been provided at all. In *Finch* v. *Telegraph Construction Co. Ld.*[11] the judge who tried the present case had to decide whether goggles had been provided under section 49 of the Act. He accepted evidence that there were goggles in the foreman's office but he found that the plaintiff did not know where they were. He held, therefore, that they had not been provided.

Neither of these cases, in my opinion, assists the defendants here. We were, however, referred to a dictum of du Parcq L.J. in *Gibby* v. *East Grinstead Gas and Water Co.*,[12] agreed to by the other members of the court, which undoubtedly on the face of it supports the judge's construction. The deceased had met his death by falling from an unfenced gantry at night. The claim was based on breach of statutory duty and negligence. The defendants pleaded that the deceased was guilty of a breach of section 119 and of contributory negligence. The trial judge had found that there was no breach of statutory duty or negligence on the part of the defendants, and that the deceased had been guilty of contributory negligence as well as of a breach of section 119. In the appeal the first judgments were delivered by Scott L.J. and Goddard L.J. They dismissed the appeal on the ground that the plaintiff was guilty of contributory negligence, making no reference to section 119. Assuming, therefore (and on this point the respondents were not called on to argue), that the defendants had been guilty of a breach of statutory duty or negligence the plaintiff's contributory negligence was at that date an answer to the whole claim.

[10] [1938] 1 K.B. 130.
[11] [1949] 1 All E.R. 452.
[12] [1944] 1 All E.R. 358.

du Parcq L.J. dismissed the appeal on the same ground, but at the beginning of his judgment dealt with the alleged breach of section 119. This was that the plaintiff had not used a hurricane lamp. du Parcq L.J. said he was "strongly inclined to disagree" with the judge upon that point. He said this[13]: "I doubt very "much whether the deceased, if he had lived, could have been "convicted, on the known facts, of an offence under that section. "It is not at all clear that the hurricane lamp of which we have "heard so much was, within the meaning of that section, pro-"vided for the use of this workman, among others, under the "Factories Act; and the further difficulty arises that he was not "ordered to use it, or ordered to use it at any particular time. "It was left to his discretion whether to use it or not." The Lord Justice went on to express his doubts whether the plaintiff had committed any offence. He then considered contributory negligence, and that is clearly the ratio of his decision.

The other members of the court expressed their agreement with what he had said with regard to section 119. One has to consider the words used in the light of the facts. It seems clear that hurricane lamps were available for this or other purposes. Some of the men who had to go on this gantry at night used their own torches. It may well be that if one is dealing with an appliance of general use, like a lamp, it is not "provided for use" under the Act for any particular operation unless its use is by instructions related to that operation. On this view the words used would have no necessary application to the facts here where the guard was part of the machine being used. If they were intended to be of general application I find them difficult to reconcile with the words of the Act.

Here we have a case in which the plaintiff knew all about the appliance. He had just removed it and it was at hand and available. Was an order by the defendants to use the guard for the process on which the plaintiff was engaged a condition precedent to liability under section 119 as suggested? The duty of providing something and the duty of ordering it, if provided, to be used are two different things. If Parliament had intended the giving of an order to be a condition precedent to an offence it would, I think, have said so. I think the words of the Act impose an absolute duty once it is established that the appliance was there and available. He wanted to save time for his employers. The fact that the directors demonstrated his work to him without the guard, and acquiesced in his so doing, would be very relevant in considering whether it was a proper case for a prosecution, or whether, if proceedings were brought, any penalty should be imposed. They are also relevant to the question which we have to decide, namely, to what extent does it entitle the defendants to say that the plaintiff should bear part of the damages. I cannot, however, find anything in the words of the section which enables it to be said that in the circumstances of this case no offence was committed.

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[13] [1944] 1 All E.R. 358, 363.

Mr. Nelson argued that an appliance could not be said to be provided for the plaintiff's use when it was indicated to him that he need not use it. I have come to the conclusion that the words "for the use of any such person" in section 119, followed, as they are, by the words "under this Act," are simply to identify the category of persons within the scope of the section. It was "provided" in the ordinary sense of the word, and under the Act it was his duty to use it.

In considering the issue of contributory negligence the judge rightly had regard to the action of the employers in setting the example of and acquiescing in non-user of the guard. The plaintiff, in answer to questions, admitted that he appreciated the risk and the danger of not using the guard. He was speaking after the accident. Of course there was a risk. There are constantly risks. The question is: was he negligent in assuming that for him, a skilled man, concentrating on taking a few samples, there was no necessity to put back the screen? He clearly took the view that there was no real or sufficient danger in the circumstances to him which would justify the expenditure of time in replacing and removing the guard. I agree with the judge that, though it turned out that he was wrong, negligence is not established. I would reduce the damages by 20 per cent. by reason of the breach of section 119.

There remains to consider whether the sum of £1,500 is excessive. I will read what the learned judge said: "His "injuries are not exceptionally severe, and the short time that "he spent in hospital shows that there was no unusual degree "of pain and suffering. He has not been prevented from carrying on his ordinary employment. But he is hampered in "picking up or handling small objects with his right hand, and "in getting a grip on large ones. That must be a handicap to "him in his work as well as in the everyday tasks of life. If "there were (as there may be in the course of his life) some "change in the present condition of the labour market it would "make it more difficult for him to get work. There is also some "unsightliness in his hand to be taken into consideration. No "special damage is claimed. There will be judgment for the "plaintiff for £1,500 and costs."

Our attention was drawn to a statement in the medical report that instructions had been given him in active exercises and in re-educating his hand for delicate manipulation. It may be the figure is high. It has, however, to be remembered that the plaintiff has started on a career where manipulative skill is important. Remarkable progress has no doubt been made in enabling men to overcome disabilities. I would have thought, however, that there must be processes and possibly highly paid processes requiring a manipulative skill in each hand from which the accident will exclude him. The figure is not one with which, in my opinion, we ought to interfere.

The appeal will be allowed to the extent of reducing the sum to £1,200.

Denning L.J. This power press was a dangerous machine which had to be securely fenced. It was provided with a proper guard; but, in order to comply with the Act, it was essential that the guard should be be kept in position while the press was in motion. (See section 16 and *Nash* v. *High Duty Alloys Ld.*[14]) The question in this case is: Whose duty was it to see that the guard was kept in position? Undoubtedly it was the duty of the occupier of the factory, but was it not also the duty of the man who was working the machine? The answer to this question is, I think, that the statute is imperative. It requires the guard to be kept in position whilst the press is in motion. (See section 16.) Ignorance of the statute is no excuse either for the occupier or for the workman. If a guard is provided under the Act for the use of the workman then he comes under a statutory duty to use it. It is no defence for him to say that his employers did not insist on his using it. That goes to mitigation, not to exculpation.

The judge seems to have thought that under section 119 a means or appliance was not "provided for the use of" the men unless the occupier intended them to use it. I do not think that is correct. The true interpretation of the second part of section 119 is, I think, this: The occupier must provide the means or appliance required by the Act. Once he has provided a proper means or appliance in good condition and ready to hand in a proper place, then the workman comes under a duty to use it.

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[14] [1947] K.B. 377.

This duty on the workman is imposed by the Act, not by the employer. The important thing is the intention of the Act, not the intention of the employer. If the Act intends the man to use it, then use it he must, no matter what the employer thinks about it, nor even what he says or does, so long as he does not actually forbid the man to use it. Acquiescence by an employer may mitigate the man's offence but cannot absolve him of his duty.

We were reminded in this case that the Factories Act creates criminal offences and that any ambiguity should be resolved in favour of the accused. I find it more helpful, however, to remember that the Act is intended to prevent accidents to workmen; and I think it should be construed so as to further that end. See what Lord Porter said in *Harrison* v. *National Coal Board*,[15] which I quoted in *McCarthy* v. *Coldair Ld.*[16] It would, I think, be unfortunate if little or no responsibility were to be placed on the workmen themselves. Once a proper guard is provided then the men are just as responsible as the occupier for seeing that it is used. All the various regulations under the Act proceed on this basis. See, for instance, Woodworking Regulations and the Horizontal Milling Machine Regulations. It is also, I think, the basis of section 119 of the Act itself. The words and deeds of the employer may have, of course, a great bearing on the relative responsibilities. If the employer encourages the men not to use the guard, that aggravates his responsibility and lessens that of the men. But it cannot take away their responsibility altogether: *Clifford* v. *Challens*.[17]

What is the relative responsibility in the present case? The employers are mainly responsible because they set the man a bad example and acquiesced in his failure to use the guard. But the man himself was a skilled man who knew as much about the machine as his employers did, and he admitted that they never told him not to use the guard. They left him to take his own course for his own safety. He clearly failed to fulfil section 119, and I agree that the damages should be reduced by one-fifth on that account.

Romer L.J. The only point on which I find myself at variance with the judgment of the judge is with regard to the meaning and effect of section 119 of the Factories Act, 1937, and I propose to confine my observations to that question. The

[15] [1951] A.C. 639, 650.

[16] [1951] 2 T.L.R. 1226, 1227.

[17] [1951] 1 K.B. 495.

relevant part of the section provides that "Where any means or "appliance for securing health or safety is provided for the use "of any such person under this Act he shall use the means or "appliance." The judge held that, although a guard was in fact fitted to the press which the plaintiff was using for testing purposes at the time of the accident, it cannot be regarded as having been "provided" within the meaning of the section and, accordingly, the plaintiff, in not making use of it, was not in breach of the statutory obligation which the section imposes. Devlin J. said, with regard to this: "In my judgment an article "is not 'provided' within the meaning of the Acts merely by "supplying it and making it available. When the term is considered in the light of the policy of the Acts I think that the "article must be provided in a manner which makes it clear to "the workman that he is expected to use it. That will not "always involve an express oral direction; the purpose for which "an article is supplied may often be too obvious for words." The judge then went on to say that that was not so in this case, on the ground that the plaintiff was impliedly told by his employers that the guard was intended for use in operation only and that he was not expected to use it for testing. If the judge had found (which he did not find) that the employers told the plaintiff that he was not to use the guard during the process of testing, then *Murray* v. *Schwachman Ld.*[18] is authority for the proposition that the guard was not, quoad that process, "provided," on the obvious ground that a thing cannot be regarded as provided for use if a prohibition is placed upon its user.

That was not, however, the case here, and the argument which was advanced before us (and which is, I think, supported by the language of the judge which I have quoted) is that an employer does not "provide" a safety device within the meaning of section 119 unless he tells the workmen concerned that they have got to use it. I am unable to find any sufficient warrant for that view. The primary meaning of the word "provide" is to "furnish" or "supply," and accordingly, on the plain, ordinary interpretation of section 119 (1), a workman's statutory obligation is to use safety devices which are furnished or supplied for his use by his employers. I am aware that the section, being a penal section, has to be construed strictly, but I cannot see any reason why that should involve reading into the section words that are not there, particularly when the section makes perfectly good sense without them.

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[18] [1938] 1 K.B. 130.

I respectfully adopt the words of Lord Macmillan in *London & North Eastern Railway Co.* v. *Berriman*, where he said[19]: "Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language." Taking, then, section 119 by itself I can find no legitimate reason for attributing to subsection (1), through the medium of the word "provided," the same effect as it would have had if words such as "if he had been ordered to use them" had been added at the end. It is for Parliament, if it thinks proper to do so, and not for the courts, to add to a statutory obligation a qualification which is not there.

So much for section 119 (1) when taken by itself. If, however, one looks to sections 14 and 16 of the Act (which are complementary to section 119 and impose obligations on the employers) there is still further reason for rejecting the suggested implication. By the proviso to section 14 (1) it is enacted that the requirements of the subsection "shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part." Section 16 refers to "all fencing or other safeguards provided in pursuance of the foregoing provisions of this part of the Act"; those provisions include (inter alia) subsections (2) and (4) of section 13, which compel employers to "provide" the devices and mechanical appliances therein mentioned. The word "provide" must, on ordinary principles of construction, surely have the same meaning in section 119 as in section 13 (2) and (4) and section 14 (1) of the Act; and it would follow that if a safety device is not "provided" within section 119 unless its physical provision is accompanied by an order to use it then, in the absence of such an order, employers who have done all that they are expressly told to do have yet not performed their statutory obligations under sections 13 and 14 in full, and can be proceeded against accordingly. I cannot accept a construction of section 119 which, whilst qualifying the obligations of the workmen, might fairly be regarded as adding pro tanto, and merely by implication, to the statutory obligations of the employers. It is, I think, clear that the word "provided" is used in sections 13, 14 and 16 in its ordinary natural sense, and is similarly so used in section 119.

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[19] [1946] A.C. 278, 295.

I am conscious of the fact that some of the language of du Parcq L.J. in *Gibby* v. *East Grinstead Gas and Water Co.*[20] is not altogether in conformity with the views above expressed. His observations, however, were not necessary for the decision of the case which was before the court and which was determined upon quite different grounds; moreover the Lord Justice only referred to the fact that the workmen had not been ordered to use the hurricane lamps which were there in question as a "difficulty" in the way of a conviction under section 119, from which I gather that he was not expressing a concluded view that a prosecution would necessarily fail. It may well be that if a complicated safeguard is provided for use in connexion with a process or machinery of an intricate character and the workman is not instructed as to the purpose of the safeguard, or how to use it, he would not be convicted for a breach of the relevant obligations under section 119; indeed, in such circumstances it is unlikely that he would be prosecuted at all. Assuming, however, that to be so, it by no means follows that a workman who has been so instructed can successfully defend himself by saying that he had not been ordered to use the safeguard; and, for the reasons which I have endeavoured to express, such a defence would, in my judgment, be of no avail.

I would add that I quite agree with what my brethren have said to the effect that safeguards which employers are under a duty to provide must be placed ready to the workman's hand. That view is in no way attributing a strained or unnatural meaning to the word "provide," for it cannot fairly be said that a safeguard is being provided for the use of workmen unless it is made readily and obviously available. A butcher does not "provide" or "supply" his customer with meat if he leaves it at the roadside a mile away from the customer's house.

On the other matters that were argued before us there is nothing that I wish to add to what my Lord has said; and I agree that the damages which were awarded to the plaintiff should by reduced by 20 per cent. owing to the breach of his statutory obligation.

Appeal allowed.

Solicitors: *R. I. Lewis & Co.; George C. Carter & Co.*

A. W. G.

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[20] [1944] 1 All E.R. 363.

RAMA CORPORATION LD. *v.* PROVED TIN AND GENERAL INVESTMENTS LD.

1952
Jan. 22,
23, 24;
Feb. 5.

Slade J.

Company—Director—Authority—Articles of association—Power of board of directors to delegate their powers to single director—No delegation—Contract made with firm by single director—Repudiation by company—Firm's ignorance of power to delegate—No ostensible or apparent authority—Company not liable.

A person who at the time of entering into a contract with a company, registered under the Companies Acts, has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent of the company with whom he dealt. The doctrine of constructive notice of a company's registered documents is a purely negative one which does not operate against a company but only in its favour.

Houghton & Co. v. *Nothard, Lowe & Wills Ld.* [1927] 1 K.B. 246, and *Kreditbank Cassel* v. *Schenkers Ld.* [1927] 1 K.B. 826 followed.

British Thomson-Houston Co. Ld. v. *Federated European Bank Ld.* [1932] 2 K.B. 176 not followed.

ACTION.

On March 21, 1949, one Wedderburn, the principal director of the plaintiff company, and George Eric Titley, an active director of the defendant company, each purported on behalf of his company to enter into a certain transaction. The defendant company had agreed to buy at a discount invoices of R. B. K. Products Ld. in connexion with sales of a telephone directory holder. The defendant company were expending £5,000 and the plaintiff company were invited to participate with them in a joint venture, the plaintiff company contributing £2,000 and the defendant company having the management of the venture and collecting the money and accounting to the plaintiffs for it. Wedderburn, who had known Titley for a long time, had never heard of the defendant company before March 21, 1949, and he made no inquiries about it. After agreeing to the joint venture he was asked for and gave a cheque on behalf of the plaintiff company in favour of Titley. Titley shortly afterwards confirmed the arrangement which had been reached between him and Wedderburn in a letter written on his own writing paper and referring to the defendant company. Titley never at any time disclosed to his fellow members on the board of the defendant company anything about the transaction which he had purported to make on its behalf with Wedderburn on behalf of the plaintiff company.

1952

Rama Corporation Ld. v. Proved Tin and General Investments Ld.

The transaction of March 21, 1949, was intra vires the defendant company, and by article 119 of the defendant company's articles of association: "The directors may delegate any of their "powers, other than the power to borrow and make calls, to "committees consisting of such members of their body as they "think fit." The board had not in fact, however, delegated any of their powers, and neither the plaintiff company nor Wedderburn had at any time inspected the defendant company's file to satisfy themselves of the existence of the defendant company's power to delegate. The defendant company repudiated the agreement.

The plaintiff company claimed from the defendant company an account of moneys alleged to have been paid to the defendant company under the terms of the agreement of March 21, 1949. They claimed in the alternative £1,000 with interest under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, being the balance of the moneys which they alleged they had paid to the defendant company; and in the further alternative damages for the alleged fraud of the defendant company's agent. They contended that they had been induced to enter into the agreement and to pay moneys to the defendants by the fraud of Titley, acting within the scope of his authority as a director of the defendant company, in fraudulently holding himself out to the plaintiff company as having been duly authorized by the defendant company to enter into the agreement and to receive the moneys on their behalf.

The defendant company denied that they entered into the agreement as alleged or that Titley had any authority, express, implied or apparent, to enter into it, and they denied that Titley acted as their agent to receive moneys from or to pay moneys to the plaintiff company. They did not admit that the plaintiff company were induced to enter into the agreement by the fraud of Titley, and denied that he was acting within the scope of his authority as a director in the fraudulent holding out which the plaintiff company had alleged.

The plaintiff company submitted that the defendant company were estopped from denying that Titley was authorized to enter into the agreement on their behalf because, amongst other things, their memorandum and articles of association showed that he was capable of being so authorized.

Perrett for the plaintiff company.

T. Michael Eastham for the defendant company.

Cur. adv. vult.

1952

RAMA CORPORATION LD.
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February 5. SLADE J. [after reviewing the facts]:—The material facts for the purposes of my judgment are as follows: (1) that Wedderburn trusted Titley completely; (2) that he had never heard of the defendant company before March 21, 1949; (3) that the whole bargain was concluded, or believed to have been concluded, in Wedderburn's office on March 21, 1949, and that on that date Wedderburn had no knowledge of the contents of the defendant company's articles of association. I find as a fact that Wedderburn did not rely on any power contained in those articles of association to delegate the powers of the defendant company's board to a committee of their number (who might in law be a committee of one), and I find further that Titley never at any time disclosed to his fellow members of the board of the defendant company anything whatever about the transaction which he purported to enter into on its behalf with Wedderburn on behalf of the plaintiff company on March 21, 1949.

In my judgment I am bound by the decision of the Court of Appeal in *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[1] to hold that a person who, at the time of making a contract with a company registered under the Companies Acts, has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent with whom he dealt, and by the same authority I am constrained to hold that the doctrine of constructive notice, that is to say, the doctrine of constructive notice of a company's registered documents, such as its memorandum of association, its articles of association, its special resolutions, etc., does not operate against a company, but only in its favour. Put in the converse way, the doctrine of constructive notice operates against the person who has failed to inquire, but does not operate in his favour. There is no positive doctrine of constructive notice; it is a purely negative one.

I am also bound by the same authority to hold that a person cannot set up an ostensible or apparent authority unless he relied on it in making the contract or supposed contract. Although I am bound by that decision, had the matter been res integra, I should unhesitatingly have come to the same conclusion and have respectfully allied myself with the judgment of Sargant L.J. Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation,

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[1] [1927] 1 K.B. 246.

(ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance.

Houghton & Co. v. *Nothard, Lowe & Wills Ld.*[1] went to the House of Lords,[2] who affirmed the decision of the Court of Appeal on other grounds, and they made no reference to, and still less in any way criticized, any of the judgments of the Court of Appeal. *Houghton's* case[1] was followed by the Court of Appeal in the same year in *Kreditbank Cassel* v. *Schenkers Ld.*[3] Both those cases were tried, in the first instance, by Wright J. *Kreditbank Cassel* v. *Schenkers Ld.*[3] was tried by Wright J. on June 17, 1926; the Court of Appeal decision in *Houghton's* case[1] was given on July 22, 1926. It is clear, therefore, that that decision had not been given at the time Wright J. tried the second of the two cases on June 17, 1926.

It is convenient for me to refer at this stage to *Jacobs* v. *London County Council*,[4] a case in the House of Lords, which decides, among other things, that a reason given by a judge for his decision is not to be regarded as obiter dictum merely because he has given another reason also for his decision; and I refer particularly to the opinion of Lord Simonds.[4]

In *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[1] the facts, very shortly, were these: The appellants Houghton & Co. were fruit brokers. There were two companies engaged in the sale of fruit through the instrumentality of brokers, and for the purpose of reducing competition those two companies decided to form a third company, the respondent company. One of the two companies which formed the third company had a name very similar to the newly formed company, and to distinguish it in the action it was referred to as the preserving company. A Mr. Maurice Lowe, a director of both the preserving company and the newly formed company, purporting to act not only on behalf of the preserving company, who were badly in need of money, but also on behalf of the newly formed company, made an arrangement with the appellant company whereby, in consideration of Houghton & Co. advancing money to the preserving company, the preserving company and the new company would give all the sales of their fruit to Houghton & Co. and would authorize them to retain money out of the proceeds of the sale of that fruit in partial reimbursement of the sums lent to the preserving company. It followed that, in so far as Houghton & Co. received money from the sales of the respondent company's fruit, they were claiming to be authorized to use the respondent company's money for the purpose of repaying the indebtedness of the preserving company, which was a wholly different legal entity.

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[1] [1927] 1 K.B. 246.

[2] [1928] A.C. 1.

[3] [1927] 1 K.B. 826.

[4] [1950] A.C. 361, 369.

The appellant company were sufficiently surprised by this magnanimous offer on the part of the defendant company through the instrumentality of Mr. Maurice Lowe, who, as a director of the preserving company, was anxious to get money, not to accept the mere ipse dixit of Mr. Maurice Lowe as being sufficient to bind the newly formed company, and they said they would want written confirmation from that company. Unfortunately, the written confirmation which they received was a letter signed only by the secretary of the newly formed company, who had no shadow of authority to make a contract on his company's behalf, and the so-called confirmation was not worth, in law, the paper on which it was written.

The headnote, which is abundantly borne out by the judgments, begins [5]: "The doctrine of constructive notice operates "adversely to a person who neglects to inquire; it does not entitle "such a person to claim for his own advantage to be treated "as having knowledge of the facts which inquiry would have "disclosed. . . . The secretary had no authority to give such "confirmation. The defendants subsequently repudiated the "agreement as made without their authority. In an action for "breach of that agreement, the plaintiffs claimed that M. L. or "the secretary had ostensible authority, inasmuch as such an "agreement might have been made by the board, and the plain-"tiffs were entitled to assume that the board had delegated their "powers in that behalf to M. L. or to the secretary, under the "articles of association. At the time that they made the advance "the plaintiffs had no knowledge of the terms of the defendants' "articles of association or that they incorporated Table A."

The articles of Nothard, Lowe & Wills incorporated article 91 of Table A, which, as it then existed, was almost in identical terms with the relevant portion of article 119 of the defendant company's articles of association: "The board of directors may "delegate any of their powers to committees consisting of such "member or members of their body as they think fit."

The Court of Appeal held that, "whether the agreement was "to be treated as having been made by M. L. as an ordinary "'director' of the defendant company, or by the secretary as

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[5] [1927] 1 K.B. 246.

" 'agent,' or by the two combined, the plaintiffs were not entitled " to assume that any authority to make it had been delegated to " them by the board, and for the following reasons:—(1) Although " a person who contracts with an individual director or servant of " the company, knowing that the board of directors has power to " delegate its authority to such an individual, may under certain " circumstances assume that that power of delegation has been " exercised and that he may safely deal with the individual in " question as representing the company, he cannot rely on " the supposed exercise of such power if he did not know of the " existence of the power at the time that he made the contract"; (2) that, in any event, the plaintiffs were put upon inquiry; (3) "*per* Sargant L.J. (in whose judgment Atkin L.J. concurred): " Even if the plaintiffs had known of the existence of the express " power of delegation they would not have been entitled to assume " that it had been exercised in favour of M. L. or the secretary " to any greater extent than was to be inferred from the positions " which M. L. and the secretary respectively occupied or were " held out by the company as occupying."

That means that if the articles authorized the board to give certain powers, for example, to the office boy, and the office boy purported to enter into an important contract on behalf of the company, a person would not be entitled to assume that, even if some powers had been conferred pursuant to the authority to confer them, they would extend to such an unusual transaction. The material finding for the purposes of the present case is the first one.

Wright J. had held that the plaintiffs were entitled to deal with Mr. Maurice Lowe as the representative and plenipotentiary of the defendant company, and that it was immaterial whether he was actually authorized to make the agreements or not; for they were justified in assuming that Mr. Maurice Lowe, although he was only an ordinary director and not a managing director, had authority to bind the defendant company by the bargain which it purported to make, even though they had in fact no knowledge of the terms of the defendants' articles of association or that they empowered the board to delegate their functions to a single director. Wright J. was reversed by the Court of Appeal.

The arguments of Mr. A. T. Miller K.C., Mr. S. L. Porter K.C. (now Lord Porter) and Mr. Chappell before the Court of Appeal are interesting[6]: " Under the Companies Act the articles

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[6] [1927] 1 K.B. 246, 251.

" of association is a public document, which is open to the inspec-" tion of any member of the public, and accordingly persons who " have dealings with a registered company must be taken to have " constructive notice of the articles. . . . It is not essential for " the party dealing with the company to prove that he had " studied the articles; it is enough that if he had done so he " would have been entitled to assume that the board had exer-" cised the power which the articles conferred. The company " will be bound if the director could have had the authority to " make the contract sued on. . . . This is the basis on which " the rule in *Royal British Bank* v. *Turquand*[7] proceeds. . . . " Indeed in none of the cases in which it was held that the " person dealing with a company was entitled to assume that the " director or other official of the company had the authority " which he purported to have did the judgment proceed on the " basis that the party had in fact studied the public documents. " The party must for all purposes be treated as if he had read " them; and this is what Lord Hatherley meant in *Mahony* v. " *East Holyford Mining Co.*[8] when he said that the articles of " association and the partnership deed are open to all who are " minded to have any dealings whatsoever with the company, " and 'those who so deal with them must be affected with notice " of all that is contained in those two documents.' "

At that moment of the argument Sargant L.J. intervened with these words: " The doctrine of constructive notice is not a " positive doctrine, but a negative one operating against a " person who has not inquired."

Bankes L.J. said[9]: " The dispute between the parties " depended entirely upon whether the defendants were or were " not bound by an agreement which was said to have been " entered into on their behalf by one of their directors, Mr. " Maurice Lowe." Later on he said[10]: " The plaintiffs' second " ground of claim and the defence to the counterclaim were rested " upon the rule of law laid down in *Mahony* v. *East Holyford* " *Mining Co.*[11] and other similar cases. Upon this part of the " case the judge decided in the plaintiffs' favour. I should not " have been at all sorry if I could have shared the judge's view. " In my opinion the facts are too strong to admit of the applica-" tion of the rule referred to. The rule, and the application of " the rule, were recently discussed in this court in the case of

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[7] (1856) 6 E. & B. 327.

[8] (1875) L.R. 7 H.L. 869, 893, 895.

[9] [1927] 1 K.B. 254.

[10] Ibid. 259.

[11] L.R. 7 H.L. 869.

" *Underwood Ld.* v. *Bank of Liverpool*,[12] where the authorities " are collected. Those authorities, I think, make it clear that in " order to establish a case which falls within the rule it is essential " that the person who claims the benefit of it must (a) prove that " he relied upon the ostensible authority which he sets up, and " (b) must not have been put upon inquiry as to whether the " transaction was in order. In the present case the plaintiffs " fail, in my opinion, on both points. . . . Mr. Dart in dealing " with the defendant company was not relying upon any ostensible authority in Mr. Maurice Lowe, but upon what he unfor" tunately accepted as a binding written acceptance by the " company of the terms negotiated between Mr. Maurice Lowe " and himself. This conclusion , once arrived at, is sufficient to " dispose of these appeals. As I have mentioned the second " point I will deal with that "—that is the point about being put upon inquiry which is not material to my decision in this case.

Atkin L.J. concurred with the reasons given in the judgment of Sargant L.J., who said[13]: " The decision of Wright J. in " favour of the plaintiffs is founded not on actual authority, but " on a wholly different ground—namely, the title of the plaintiffs " in the circumstances to assume that such an authority had " been given, and to act on that assumption." Wright J. relied on the fact that under the articles of association of the defendant company their board of directors might have delegated their power to enter into such a contract to any person, including a single director or their secretary. He drew the conclusion that, although this power to delegate was unknown to Mr. Dart or to anyone else acting for the plaintiffs, yet Mr. Dart and the plaintiffs were entitled to treat this as a matter of internal management only and to assume that Mr. Maurice Lowe and the secretary in fact possessed the power to bind the defendant company.

The important part of the judgment is where Sargant L.J. said[14]: " Next as to the power to delegate which is contained in " the articles of association. In a case like this where that power " of delegation had not been exercised, and where admittedly " Mr. Dart and the plaintiff firm had no knowledge of the exist" ence of that power and did not rely on it, I cannot for myself " see how they can subsequently make use of this unknown " power so as to validate the transaction. They could rely on " the fact of delegation, had it been a fact, whether known to " them or not. They might rely on their knowledge of the power

[12] [1924] 1 K.B. 775.

[13] [1927] 1 K.B. 246, 263.

[14] Ibid. 266.

“of delegation, had they known of it, as part of the circumstances entitling them to infer that there had been a delegation and to act on that inference, though it were in fact a mistaken one. But it is quite another thing to say that the plaintiffs are entitled now to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted. No case was cited to us in which a binding obligation has been constructed out of so curious a combination; and I cannot see any principle on which an obligation could be so constructed. . . . Perhaps the nearest approach to the present case is to be found in *Biggerstaff* v. *Rowatt's Wharf Ld.*[15] But there the agent whose authority was relied on had been acting to the knowledge of the company as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is I think clear that the transaction there would not have been supported had it not been in this ordinary course, or had the agent been acting merely as one of the ordinary directors of the company. I know of no case in which an ordinary director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract.”

Sargant L.J., in referring to *Biggerstaff's* case,[15] and giving the ground which, in his view, underlay the decision in that case, might have fortified the view that he was expressing in his judgment by referring to this passage from the judgment of Lindley L.J. in *Biggerstaff's* case[16]: “It is said that the company are not bound by those orders because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes”—I emphasize the next three or four lines—“The persons dealing with him must look to the articles, and see that the managing

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[15] [1896] 2 Ch. 93.

[16] Ibid. 102.

"director might have power to do what he purports to do, and "that is enough for a person dealing with him bona fide."

In *Kreditbank Cassel* v. *Schenkers Ld.*, in the court of first instance,[17] Wright J.'s judgment was given before the judgment which I have just read in the Court of Appeal. He said[17]: "The memorandum and articles are public documents, and "everyone dealing in such matters with a limited company is "taken in law to be acquainted with their terms. But once it "appears that the company has the necessary power, and that "the person purporting to bind the company by his signature to "the negotiable instrument on the company's behalf falls within "the category of persons who under the articles might be "properly so empowered if the appropriate steps by way of "internal management have been taken, the company will be "bound. On any other basis the position of persons dealing with "the negotiable paper of a limited company would be very "difficult and business could not go on. The rule is subject to "the obvious limitation that the person so dealing must have no "actual or constructive notice that the professing agent of the "company has not authority in fact: *Underwood Ld.* v. *Bank* "*of Liverpool and Martins*[18]"—I emphasize these next words— "I do not find it laid down as a condition that the person so "dealing must have actually examined the articles of association. In business he would seldom or never do so, but take the "risk. He is bound by the articles if they are adverse to his "claim: it seems that if the articles are in his favour he should "be entitled to benefit by their terms."

That is the very argument which has been put forward on behalf of the plaintiff company in this case. It was rejected by the Court of Appeal, who held themselves bound by their recent decision in *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[19]

In *Kreditbank Cassel* v. *Schenkers Ld.*[20] the facts are not very material. The Manchester manager of Schenkers Ld., in fraud of his employers, purported to draw seven bills of exchange on behalf of his company. The bills were duly accepted; they were dishonoured by the acceptors and the appellant bank who were, I think, holders in due course, sued Schenkers Ld. as the drawers of the bills. Schenkers Ld. said that the man who purported to sign those bills on their behalf was only their Manchester manager. He was not a director of the company. He was not even manager in the full sense. He was the branch manager. The headnote to the report in the Court of Appeal reads: "*Held*, (1) applying *Houghton & Co.* v. *Nothard, Lowe &* "*Wills Ld.*[19] " [the Court of Appeal decision and not that of the House of Lords]: "that as it did not appear that the plaintiffs "knew of the existence of the power of delegation contained in "the defendants' articles of association they were not entitled to "rely upon its supposed exercise."

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[17] [1926] 2 K.B. 450, 459.

[18] [1924] 1 K.B. 775.

[19] [1927] 1 K.B. 246.

[20] [1927] 1 K.B. 826.

The Court of Appeal also held that as the bills of exchange were forgeries the rule in the *Royal British Bank* v. *Turquand* [21] did not apply anyhow; and, indeed, they gave other reasons for their decision. But there is no doubt that one of the reasons for the decision was the first one that I have read from the headnote, and the Court of Appeal held they were bound in that respect by their previous decision in *Houghton's* case.[19] By a resolution of the directors the company's bank was empowered to honour the signature of the Manchester manager on all cheques payable only to His Majesty's customs. Wright J. had held that Clarke in drawing the bills on behalf of the defendants was a person acting under their authority within the meaning of section 77 of the Companies (Consolidation) Act, 1908, and that the defendants were liable inasmuch as by their constitution the Manchester manager might have been authorized to draw the bills, and therefore a person taking them in due course was not prejudiced because Clarke had no authority in fact.

Mr. Pritt, arguing for the defendants, said [22]: "*Houghton &* "*Co.* v. *Nothard, Lowe & Wills Ld.*[19] shows that a person who "has no knowledge of the existence of the power of delegation "in a company's articles of association—and in this case it was "not shown that the plaintiffs had such knowledge—cannot rely "upon it so as to validate an unauthorized transaction."

Atkin L.J. interposed to ask whether it could not have been within the implied authority of Clarke to draw and indorse the bills. In giving judgment Bankes L.J. said [23]: "The plaintiffs' "case was that the defendants, a limited company, had in their "articles of association an article which authorized the delegation "of authority to do such an act as drawing or indorsing bills of "exchange, and that, in view of that, the rule of law laid down "by the House of Lords in *Mahony* v. *East Holyford Mining* "*Co.*[24] applied, because the plaintiffs had discounted the bills

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[19] [1927] 1 K.B. 246.
[21] 6 E. & B. 327.
[22] [1927] 1 K.B. 826, 829.
[23] Ibid. 832.
[24] L.R. 7 H.L. 869.

"bona fide and without notice of any irregularity attaching to "them. Upon that state of facts and upon that contention "Wright J. decided the case. At that time *Houghton & Co.* v. "*Nothard, Lowe & Wills Ld.*[25] in this court had not been decided. "Mr. Pritt for the defendants relies upon that case as an authority that on the facts and the particular form of the article "in this case the plaintiffs fail in substantiating their cause of "action. But during the argument another point was taken—"namely, that the act of the branch manager was a forgery. . . . "In *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[25] the article "empowered the directors to 'delegate to any managing director, "'local board, head manager, manager, attorney or agent any "'of the powers . . . for the time being vested in the directors.' "The authority there was thus more circumscribed than here, "because it indicated by description the persons to whom the "authority might be delegated. In that case all the members of "the court came to the conclusion that the plaintiffs were not in "a position to rely upon the rule in *Mahony* v. *East Holyford* "*Mining Co.*[24] because upon the facts the true inference was "that they did not rely upon any suggested delegated authority. "The true inference from the facts there was that the plaintiffs "distrusted the position of the person who was negotiating on "behalf of the company, and, distrusting his authority, they "required express confirmation of it, and, unfortunately for "them, the express confirmation was no confirmation at all. But "Sargant L.J., in whose judgment Atkin L.J. concurred, went "further and laid down in terms a proposition of law that, in "the circumstances of that case, which I cannot distinguish from "those now before us, the rule in *Mahony* v. *East Holyford* "*Mining Co.*[24] does not apply. If I am correct in that view, that "is sufficient to dispose of this appeal."

Scrutton L.J. said[26]: "This is not an easy case, and, but for "two decisions to which we have been referred, I should have "desired to go much more carefully into the various lines of "authorities than has been done; but in my view this court is "bound by authority to decide that this appeal should be allowed "... this action was brought and came before Wright J., who "applied the doctrine of *Royal British Bank* v. *Turquand.*[27] "As I understand that doctrine it is this: any person dealing "with a company is deemed to have notice of its articles of "association—some of the cases go further and say that he must

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[24] L.R. 7 H.L. 869.

[25] [1927] 1 K.B. 246.

[26] [1927] 1 K.B. 826, 836.

[27] 6 E. & B. 327.

" be deemed to understand them, an extensive presumption " sometimes—but if, looking at the articles, or being deemed to " know their contents, the thing that has been done is one that " might have been done, if certain internal arrangements had " been made, the person so dealing with the company is not " bound to inquire whether those internal arrangements have " been carried out, but is entitled to assume regularity in the " proceedings. Acting on that decision Wright J. found that as " there was in the articles of Schenkers Ld., an article under " which power could have been delegated to Clarke, the Manchester manager, the bank was not bound to inquire whether " power had in fact been delegated to him and consequently, on " *Turquand's* case,[27] and the line of authorities following it, the " judge held that the bank was excused from inquiring whether " the domestic arrangements necessary to delegate to Clarke the " power to draw bills of exchange had been complied with. " There are two matters which, I think, bind me to say that " Wright J.'s decision is wrong. . . . The second matter which " I think binds me is this. In *Houghton's* case,[25] which in many " of its details is very similar to this, two judgments in effect " were given in the Court of Appeal. Bankes L.J. dealt with " the question on the particular facts and declined to express any " further opinion, but Sargant L.J., in whose judgment Atkin " L.J. concurred, took a further point. He there said that " although there is a power of delegation contained in the articles " of association, and although a person dealing with a company is " deemed to know it, he cannot be heard to say: ' I am deemed " ' to have known of the power to delegate and I acted upon it,' " unless it is proved that he had knowledge of the existence of " the power. I hope it is not disrespectful to express the wish " that Sargant L.J., who is thoroughly conversant with this " branch of law, had explained to those not equally familiar with " it, how this fits in with the doctrine enunciated in a line of " cases, of which *Mahony* v. *East Holyford Mining Co.*[24] is an " instance, that a person is deemed to know of the company's " articles of association. But, whether Sargant L.J. has explained " his reasons or not, there is no doubt about what he said, nor is " there any doubt that Atkin L.J. agreed with the reasons given. " In those circumstances, I am bound by the decision given " by the majority of the court in that case, and that decision " precludes the plaintiffs saying: ' We are deemed to know that

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[24] L.R. 7 H.L. 869.
[25] [1927] 1 K.B. 246.
[27] 6 E. & B. 327.

" 'there was a power of delegation and we are excused in those " 'circumstances from inquiring into the company's internal " 'management.' "

Anything that I say which differs from what Scrutton L.J. said at any time, I say with trepidation; but first, I think that Sargant L.J. did give his reason, and it was that the doctrine of constructive notice was a purely negative one and not a positive one; and when he says that a party is affected with notice, it means that if the party fails to inquire he will be imputed with notice: that is to say, it operates in the company's favour. It does not operate in a party's favour so as to enable him to say he relied on something of the existence of which he says he had no knowledge. Secondly, with even greater trepidation, I have no difficulty in reconciling Sargant L.J.'s judgment with the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.*[24] for the reasons which I shall shortly give.

Atkin L.J. said[28]: "I agree. . . . The true limits of the " doctrine as to the effect of an article which empowers the " company or its directors to nominate a person to have authority " to do a particular act on behalf of the company are, I think, " made quite plain in the judgments in *Houghton & Co.* v. " *Nothard, Lowe & Wills Ld.*[29] It is therefore unnecessary to " consider further the doctrine as to the knowledge of the articles " of association of a company "—I emphasize the word " knowledge " of the articles of association of a company—" I may " say this, however, that the doctrine is as to the knowledge of " the articles; that is to say, the person is to be in the same " position as if he had read them, and if he had, all that he " would see would be that the directors had power to nominate " the particular individual who could sign bills of exchange. " In such a case a person reading the articles would be in no " better a position unless he went further and inquired whether " or not the directors had in fact nominated that particular " individual to sign the bills. There are cases where that inquiry " need not be made. When, for example, you find power given " to do a certain thing, and the act can be done by the company " in board meeting, and there purports to be a resolution " authorizing it, you are not obliged to inquire whether or not " the forms of the company required by the articles as to the

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[24] L.R. 7 H.L. 869.

[28] [1927] 1 K.B. 844.

[29] [1927] 1 K.B. 246.

"constitution of the board, the quorum and so forth, have been "actually complied with. If you are dealing with a director in "a matter in which normally a director would have power to act "for the company you are not obliged to inquire whether or not "the formalities required by the articles have been complied with "before he exercises that power. Those are matters of internal "management which an outsider is not obliged to investigate."

I have gone so minutely into those two decisions of the Court of Appeal because I am quite unable to reconcile them with the reasons given in the judgment of a third decision of the Court of Appeal, namely, *British Thomson-Houston Co. Ld.* v. *Federated European Bank Ld.*[30] I have cited those passages from the judgment of Atkin L.J. because they are relied on in the judgment of the Court of Appeal in the *British Thomson-Houston* case [30] as, so far as I can see, suggesting that Atkin L.J. was saying in the *Kreditbank Cassel* case [28] that you need not always have actual knowledge of the articles of association and of the fact that they contain a power to delegate; that there are cases when you need not know them at all and need not inquire. I do not read Atkin L.J. as saying anything of the kind, and I do not see how he could hold himself to be bound by *Houghton's* case,[29] if that is what he meant.

Before turning to the third decision of the Court of Appeal I shall attempt to resolve the difficulty which Scrutton L.J. said confronted him, by referring shortly to the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.*[31] In my judgment the decision in *Mahony's* case [31] proceeded on the footing that the bank had actual knowledge of the company's articles of association. The appellant (Mahony) was the public officer of the National Bank of Dublin. A company called the East Holyford Mining Co. had been promoted by a number of persons who had obtained subscriptions and who, without having themselves been regularly appointed as directors of the company as required by the company's articles of association, described themselves as directors, acted as directors, and who could, under the company's articles of association, have been validly appointed as directors though, in fact, the necessary machinery had not been gone through to appoint them effectively as such; and that was so, also, in the case of the person who was appointed, and who was described as, the secretary of the company. The National Bank of Dublin were appointed the company's bankers, and their mandate with regard to cheques, given by means of a formal notice signed by a person describing himself as the secretary of the company, was that they were to pay cheques signed by any two of three named directors—the word directors being used in the mandate—and countersigned by himself as secretary in accordance with what was stated to be "a resolution passed this day."

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[28] [1927] 1 K.B. 844.

[29] [1927] 1 K.B. 246.

[30] [1932] 2 K.B. 176.

[31] L.R. 7 H.L. 869.

Relying on that mandate, the bankers from time to time received cheques signed and countersigned as provided for in the mandate, and duly honoured and paid them. When almost the whole of the company's funds had been drawn out, the company went into liquidation, and it then appeared that there never had been a meeting of shareholders, nor any appointment of directors or of a secretary, but that the persons who had formed the company had treated themselves as directors and secretary and appropriated the money obtained from the subscriptions. It was held that the official liquidator, who brought the action against the public officer of the bank, could not recover from the bankers the amount of the cheques which, in the circumstances disclosed in the case, the bankers had bona fide paid. The case was originally tried with a jury, and the important point appears to me to be this: Kelly C.B. stated[32] that at the trial counsel had asked the judge to give the jury certain information. "This "the judge declined to do, but, by consent, reserved liberty to "enter the verdict for the defendant, 'if the jury should have "'found in his favour on any questions that I ought to have "'submitted to them'"—I emphasize these next lines—"The "court to be at liberty to draw any such inferences of fact as in "their opinion the jury ought to have done."

In other words, the matter came before the House of Lords not only on the facts as found by the jury, but on any inference of fact which in the opinion of the House of Lords the jury ought to have drawn had those matters also been left to them. It seems to be clear that one of the inferences of fact on which the opinions of the House of Lords proceeded was that the bank by its public officer and servants had actual knowledge of the articles of association of the Holyford Mining Co. I shall endeavour to support that view of the decision by reference in particular to the opinions of Lord Chelmsford and Lord Hatherley. Lord Hatherley's opinion was referred to in the argument before the Court of Appeal in *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[29]

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[29] [1927] 1 K.B. 246.

[32] L.R. 7 H.L. 869, 880.

1952

RAMA CORPORATION LD.
v.
PROVED TIN AND GENERAL INVESTMENTS LD.

Slade J.

Lord Chelmsford said[33]: "We have a right to assume that "the bankers, acting with proper caution, before they commenced transactions with the company, referred, *as they were* "*bound to do*, to the articles of association, to ascertain in what "manner the account which had been opened was to be drawn "upon. Beyond the particulars of the objects of the company, "and information as to the mode in which the account was to be "dealt with, which alone the bank was concerned to know, I do "not consider that any more preliminary inquiries were necessary. Upon referring to the articles of association they would "have found, by the 58th clause, that every sum paid on behalf "of the company amounting to £10 or upwards, was to be paid "by cheques to be signed and countersigned as might from time "to time be directed by the board. *With this information* the "bankers must have been prepared to receive a communication "on behalf of the company as to the persons who were to sign "and countersign the cheques. And on July 26 they received "the expected letter from Wall, the person already introduced to "them through the prospectus as the secretary of the company."

Lord Hatherley said[34]: "On the other hand, on the part of "the bankers, I see no possible mode by which they might have "pursued their inquiries in the manner contended for at the Bar "without requiring all the minute books of the company to be "produced to them, and without conducting a detailed investigation into all the transactions of the company as to the "appointment of directors and the like—a duty they were not "called upon to perform, and a duty which, if it was objected to, "they could not have insisted upon performing. I apprehend, "my Lords, that the bankers having done all that was strictly "their duty to do—*having made themselves acquainted with the* "*articles of the company*,* and having seen the offices of the "company, with persons there affecting to perform all the duties "of directors according to those articles, and having seen those "who had the power of appointing them continually present "there, witnessing their performance—there can be no doubt that "in this state of circumstances the bankers are not in any default "whatsoever, and that the cheques must be taken, as between "them and the company, to have been properly drawn, and the "shareholders must be held liable to the loss."

It seems clear to me from those two passages alone that one of the inferences which the House of Lords drew was that the bank had made themselves acquainted with the articles, and the powers contained in the articles, and relied on those powers having been, as they supposed, duly exercised. There it was a question of the appointment of directors, where persons acting as directors had not been appointed at all. In another case they might have been appointed by a board meeting when there was no quorum present, or not a disinterested quorum.

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[33] L.R. 7 H.L. 869, 889.

[34] Ibid. 898.

* The italics in these two passages are those of Slade J.

Those are all matters of internal management of the company's affairs which a person, knowing of the existence of the power in the articles, and relying on it, is entitled to assume has been duly exercised. He has no power to demand production of the minute book of the company. Moreover, the question in *Mahony's* case[31] was whether the bank was entitled to treat the persons who signed the cheques as directors. They were described as directors in the mandate of the bank and they were directors de facto. Whether they were also directors de jure depended on whether the provisions in the articles relating to the appointment of directors had been complied with; and this was a matter of interior management of the company into which the bank was not, according to the rule in *Royal British Bank* v. *Turquand*,[35] bound to inquire. Their apparent position was that of directors; they had the apparent authority of directors and there was nothing in the articles restricting that apparent authority.

In my view, therefore, there is nothing whatever in the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.*[31] which is inconsistent with the judgment of Sargant L.J. in *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*[36] in the Court of Appeal.

The headnote to the report of the decision of the Court of Appeal in *British Thomson-Houston Co. Ld.* v. *Federated European Bank Ld.*[37] (which I have said I am unable to reconcile with the decisions of the Court of Appeal in *Houghton's* case[36] and in *Kreditbank Cassel* v. *Schenkers Ld.*[38]) states: "By the articles "of association of a company the directors had power to delegate "to one or more of their own body such of the powers conferred "on the directors as they might consider requisite for carrying on "the business of the company, and to determine who should be "entitled to sign contracts and documents on the company's "behalf. A document purporting to be a guarantee was given

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[31] L.R. 7 H.L. 869.

[35] 6 E. & B. 327.

[36] [1927] 1 K.B. 246.

[37] [1932] 2 K.B. 176.

[38] [1927] 1 K.B. 826.

"to the plaintiffs executed by the company in this form: 'The "'F.E.B. Ld., signed N. P.' N. P. was a director of the "company. During the negotiations for the giving of the "guarantee he had written to the plaintiffs, signing the letter "'for and on behalf of' the company, 'N. P., Chairman.' On "these facts, in an action on the guarantee:—*Held*, that the "plaintiffs were entitled to presume that the directors of the "company had authorized N. P. to sign contracts on behalf of "the company, and that the company was liable on the "guarantee."

Now, I find this, to me, surprising statement in the headnote: "*Houghton & Co.* v. *Nothard, Lowe & Wills Ld.* considered; "*Kreditbank Cassel* v. *Schenkers Ld.* followed."

The significant point about the *British Thomson-Houston* case [37] is that at the trial before Macnaghten J. neither party put in either the memorandum or the articles of association and, indeed, they were called for by Scrutton L.J. in the course of the hearing before the Court of Appeal. What was apparently admitted at the trial was that N. Pal was the chairman of the Federated European Bank Ld. board of directors, and it appeared at the trial that Pal had offered the plaintiffs a form of guarantee signed by himself for and on behalf of the defendants, as chairman, but that the plaintiffs would not accept the guarantee in that form and subsequently the form referred to in the headnote was sent by the plaintiffs and signed as I have indicated. When Scrutton L.J. called for the articles of association, it appeared that there was an article 106 giving power to the directors to delegate to any managing director, local board, committees or agents, or to one or more of their own body, or to any manager or other officer such of the powers and authorities hereby conferred on the directors, with one exception, as the board considered requisite for carrying on the business of the company. The footnote to the report stated that it appeared from the articles of association that two directors formed a quorum of the board.

It is possible to have ostensible or apparent authority, apart from the articles of association. You cannot have one inconsistent with the articles of association or beyond the articles of association, but a company can hold out by correspondence a person as holding authority which he does not, in fact, possess, to third persons dealing with him in good faith. It may be that that was the ground of the decision in the case of the managing director in X

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[37] [1932] 2 K.B. 176.

Biggerstaff's case.[39] It is not for me to say whether this principle would have applied to the act of the chairman in the *British Thomson-Houston* case.[37] I am only considering the grounds which were given by the Court of Appeal for their decision in this case, and it is sufficient to repeat that the articles were not even before Macnaghten J. at the trial. There was no suggestion that the British Thomson-Houston company or anyone acting on their behalf had ever seen the articles and still less that he, or they, relied on them. That was the basis on which the case came before the Court of Appeal. How, in those circumstances, *Kreditbank Cassel*[38] could be said to have been followed I find myself quite unable to understand. I should have thought from the fact that the quorum of directors was two and that, presumably, the articles contained the orthodox clause entrusting the management of the company's affairs to its board of directors, that unless the authority conferred by article 106 had, in fact, been exercised by a disinterested quorum of the board in favour of Pal, the chairman, he would have had no further authority under the articles than any ordinary director. He may have been chairman, but under the articles, apart from the exercise of the power conferred by article 106, it required a board meeting consisting of a minimum of two directors to bind the company.

In his judgment Scrutton L.J. said[40]: " One defence raised " is that the defendant bank have not executed it "—that is, the guarantee—" because by their articles of association any guarantee of the bank requires to be executed by two directors. At " the trial neither party put in the articles of association. Mr. " Turrell for the defendants took the point that one director had " no authority to pledge the credit of the company. In view of " the decision of the House of Lords in *Mahony* v. *East Holyford* " *Mining Co.*[41] that those who have dealings with a company are " affected with notice of all that is contained in its memorandum " and articles of association, we asked to see the articles of " association of the defendant company. Now we have seen " them, and we find that they confer upon the directors two " powers: (1) to delegate to one or more of their number any of " the powers of the board of directors, and (2) to decide who shall " sign contracts and other documents on the company's behalf. " Then *Royal British Bank* v. *Turquand*[42] and *Mahony* v. *East* " *Holyford Mining Co.*[41] decide that if the articles of association

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[37] [1932] 2 K.B. 176.
[38] [1927] 1 K.B. 826.
[39] [1896] 2 Ch. 93.
[40] [1932] 2 K.B. 176, 180.
[41] L.R. 7 H.L. 869.
[42] 6 E. & B. 327.

"give a power, persons dealing with the company, though they "are deemed to have notice of the extent of the power, are not "bound to inquire into what is called the 'indoor management' "of the company to see whether the power has been properly and "regularly exercised with all the prescribed formalities, and if they "find an officer of the company openly exercising an authority "which the directors have power to confer upon him, they are "relieved from the duty of further inquiry and are entitled to "assume that the power has been regularly and duly conferred."

For myself, and I speak with the utmost diffidence, I find it difficult to understand the words "if they find an officer of the "company openly exercising an authority which the directors "have power to confer upon him." How can they find that, if they do not know that the articles confer such a power?

Scrutton L.J. proceeds[40]: "A difficulty in the way of the "plaintiff is raised by the judgment of Sargant L.J. in *Houghton "& Co.* v. *Nothard, Lowe & Wills Ld.*[43] where one director of a "company purported to pledge certain future profits of the "company by a contract which was said to be beyond his powers. "It was a question whether his act was or was not within the "powers conferred by one of the company's articles of association. Sargant L.J. held, and Atkin L.J. agreed with him, "that, assuming that the articles enabled the directors to delegate "to the particular director power to perform the act, it was not "enough for the pledgees to rely upon their constructive knowledge of the effect of the articles where the power of delegation "had not in fact been exercised and where the pledgees had no "actual knowledge that the power existed, and did not rely on "its existence. This case was considered in *Kreditbank Cassel* "v. *Schenkers Ld.*,[44] where, besides the decision in *Houghton's* "case,[43] there were other good reasons disentitling the plaintiffs "from recovering." He enumerated two reasons and continued: ". . . thirdly, they held themselves bound to follow the decision "in *Houghton's* case.[43]"

I pause there to say that even if there were other good reasons for the decision, the House of Lords has held, in *Jacobs* v. *London County Council*,[45] that that is no ground for treating one of the grounds of the decision as mere obiter dictum. It binds me, and in my view it bound the Court of Appeal in the case which I am now reading. Scrutton L.J. proceeded[46]: "But

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[40] [1932] 2 K.B. 176, 180.
[43] [1927] 1 K.B. 246.
[44] [1927] 1 K.B. 826.
[45] [1950] A.C. 361.
[46] [1932] 2 K.B. 181.

"Atkin L.J. held that in certain circumstances the inquiry, "whether directors have in fact nominated one of their number "to do the act relied on, need not be made—namely, where "directors have power to nominate one of their number to do "acts on their behalf, and a director is found acting in a matter "in which normally a director would have power to act for his "company. In that case, in the view of Atkin L.J., a person "dealing with the company would not be obliged to inquire "whether the director had been formally invested with authority "to do the act. Assuming that to be correct, in the present case "we have a director acting in matters which are normally "entrusted to directors."

It is clear that Greer L.J. decided this case on the footing that there was an actual holding out of Pal, the chairman, apart from the articles, that is to say, the chairman was acting within his apparent authority as chairman, just as in *Biggerstaff's* case [47] the act was within the apparent authority of the person who was acting as managing director, apart from the articles. Greer L.J. said [48]: "If it were necessary for the decision of this case to "apply the first ruling, as stated in the headnote to *Houghton & "Co.* v. *Nothard, Lowe & Wills Ld.*,[43] I should find myself in "some difficulty. One of the propositions of law there stated "is: 'Although a person who contracts with an individual "'director or servant of a company, knowing that the board of "'directors has power to delegate its authority to such an "'individual, may under certain circumstances assume that that "'power of delegation has been exercised and that he may safely "'deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power "'if he did not know of the existence of the power at the time "'that he made the contract.' If I rightly understand the "decision in that case, it proceeds upon that proposition as good "law."

I respectfully assent to that statement. That was the basis, or one of the bases, underlying the decision in *Houghton's* case [43] which was expressed to be followed in the *Kreditbank Cassel* case.[44]

Greer L.J. continued [48]: "But it is not necessary for me "to inquire whether it was an essential element in the ratio "decidendi, because there are in this case adequate grounds "upon which we can rest a decision apart from *Houghton's*

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[43] [1927] 1 K.B. 246.

[44] [1927] 1 K.B. 826.

[47] [1896] 2 Ch. 93.

[48] [1932] 2 K.B. 182.

" case.[43] In the case before us the guarantee was signed by " a person who was the chairman of the board of directors. " Someone must represent the company for the purpose of conducting correspondence, it may be a secretary, or the managing " director, or some other officer; and he must have authority to " bind the company by letters written on its behalf. The person " chosen by the defendants for this purpose was the chairman of " the board, and the defendants have represented by their chairman that the plaintiffs could rely on the guarantee of the " defendants as the act of the defendants and are responsible for " those acts which they have held him out as having authority " to perform. That is enough to decide this case; I reserve for " further consideration the question how the first ruling in " *Houghton's* case[43] is to be reconciled with *Mahony* v. *East* " *Holyford Mining Co.*[49] "

Slesser L.J. said[50]: " I agree. Speaking generally of the " articles of association of the company and of the powers of the " Manchester manager in *Kreditbank Cassel* v. *Schenkers Ld.*[51] " Atkin L.J. says: ' The person ' (who relies on the articles) ' is " ' to be in the same position as if he had read them, and if he " ' had, all that he would see would be that the directors had " ' power to nominate the particular individual who could sign " ' bills of exchange. In such a case a person reading the articles " ' would be in no better a position unless he went further and " ' inquired whether or not the directors had in fact nominated " ' that particular individual to sign the bills.' But the Lord " Justice points out, as an exception, a case where this further " inquiry need not be made, as follows: ' If you are dealing with " ' a director in a matter in which normally a director would have " ' power to act for the company you are not obliged to inquire " ' whether or not the formalities required by the articles have " ' been complied with before he exercises that power.' Here we " are dealing with a company having four directors, of whom " N. Pal describes himself as the chairman and, in one case, signs " a document as ' N. Pal, Chairman.' In my opinion the plaintiffs were dealing with N. Pal in a matter in which normally a " director would have power to act. The difficulty arising on the " decision in *Houghton & Co.* v. *Nothard, Lowe & Wills Ld.*,[52] " therefore, does not press me in the present case, where, in the " circumstances, the plaintiffs were entitled to assume that they

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[43] [1927] 1 K.B. 246.
[49] L.R. 7 H.L. 869.
[50] [1932] 2 K.B. 183.
[51] [1927] 1 K.B. 826.
[52] [1927] 1 K.B. 246.

"were dealing with a person who had the authority of the "defendant company to execute the contract sued on."

If the *British Thomson-Houston* case [48] had been decided on the basis on which it was decided by Greer L.J., there is, of course, nothing inconsistent in it with the first ground of the decision in *Houghton's* case,[52] but I understand the case to have been decided by Scrutton and Slesser L.JJ. on the footing that Atkin L.J. in his judgment in *Kreditbank Cassel* v. *Schenkers Ld.*[51] had said that there were cases when you could rely on the articles of association, and a power conferred by the articles even when you did not know of the existence of the articles or power, and ex hypothesi could not have relied on them, provided you found someone like a director dealing with the matter which would normally be dealt with by a single director. I respectfully think that Atkin L.J. said nothing of the kind in the *Kreditbank* case,[51] and that the whole of his judgment, where indeed he held himself bound by the previous decision of the Court of Appeal in *Houghton's* case,[52] proceeded on the footing that the person dealing with the company had actual and not merely constructive notice of the company's articles of association.

There is a footnote by the reporter of the *British Thomson-Houston* case [53] stating: "The authorities seem to warrant the "following propositions:—If in an action against a limited com-"pany the plaintiff relies upon an act of an officer of the company, "then (1) If the company has only a limited power to do the act, "for example, a power to borrow up to a certain amount, the "plaintiff is affected with notice of the limitation."—I agree. "(2) If the articles of association of the company give the officer "authority to do the act provided certain directions are observed, "and the officer purports to do the act, the plaintiff is entitled "to assume that the directions have been followed: *Royal British* "*Bank* v. *Turquand* [54]; *Mahony* v. *East Holyford Mining Co.*[55]" —I disagree. The statement of the law there set out requires to be qualified by an addition of the requirement of actual knowledge and reliance on the existence of the power of delegation conferred by the articles. And (3), the last three lines: "It is submitted "that actual knowledge on the part of the plaintiff of the contents "of the articles of association is irrelevant except to an issue "raised as to his bona fides." I disagree, and I say that that is quite inconsistent with the decision of the Court of Appeal in *Houghton's* case.[52]

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[48] [1932] 2 K.B. 182.
[51] [1927] 1 K.B. 826.
[52] [1927] 1 K.B. 246.
[53] [1932] 2 K.B. 176, 183.
[54] 6 E. & B. 327.
[55] L.R. 7 H.L. 869.

It is not uninteresting to refer to a short passage from the speech of Lord Atkin in the House of Lords in *Midland Bank* v. *Reckitt*[56]: "It remains to deal with contentions of the bank "based upon the terms of the power of attorney. The bank never "in fact asked for or saw the terms of the document; and, for "my part, I venture to doubt whether in such circumstances "they could ever rely on any other than an actual authority. "Ostensible authority appears to be excluded when the party "averring it cannot show that any appearance of authority other "than the actual authority was ever displayed to him by the "principal. He neither shows a representation nor that he relied "on it."

I think that that passage is quite inconsistent with the construction put on Atkin L.J.'s judgment in the *Kreditbank* case[52] that one can have agency by estoppel, when there is no representation, no reliance on it, and no alteration of your position in consequence of such reliance.

In *Clay Hill Brick and Tile Co. Ld.* v. *Rawlings*[57] the defendant purchased bricks from the plaintiff company, dealing at all times with Barber, who was, in fact, the chairman of the directors of the company and who acted as managing director of the company, although in fact he had not been properly appointed to the office of managing director. At the request of Barber the defendant, in payment for the bricks, handed to him cheques made payable to him personally or his order, thinking that the company was a one-man company. The chairman cashed the cheques and did not pay the money over to the company. The articles of the company provided that the directors might delegate powers or authorities and discretions, and might annul or vary such delegation, but that no one dealing in good faith and without notice of such annulment or variation should be affected thereby. It was held that there was a power under the articles to authorize Barber to receive payments in cash, and, so far as the defendant was concerned, it must be taken that Barber had in fact such authority.

It may well be said that a person who is authorized to sell a company's goods is impliedly authorized to receive payment for them, just as a shop assistant who is authorized to sell his employer's goods is impliedly authorized to receive payment for them. I use the term "implied authority" as connoting actual authority, not, of course, ostensible or apparent authority. As I read it—I may be wrong—that is the ground on which Tucker J. decided this case in favour of the defendant, because the chairman misappropriated the money and the company, who had duly delivered the bricks, sued the buyer for the money over again, saying that the chairman was incapable of giving him a proper discharge for the payment. Tucker J. said [58]: "As I have already said, at "this time, although Mr. Barber did not hold in the company "quite the position that Mr. Rawlings thought he held, he was "none the less, during the time when the cheques were given, "the chairman of the directors, and acting as managing director, "and, at the time the last cheque was paid, he was actually "acting as manager pursuant to his appointment as such. . . . "I think that it cannot be said that to receive payment in cash "is beyond the power of a managing director or chairman of a "company. It may be true that he is not the usual person to "receive such sums. They may be received by a clerk in an "office. However, that is a very different thing from saying that "he has not the power to receive them. I think that Mr. Barber, "in the position which he held in this company, was an officer "who would not be ordinarily empowered to receive a payment "in cash, but that, as a result of article 12 of the articles of the "company, which have been put in, as between himself and "Mr. Rawlings, he might be so empowered. By article 12, the "directors may delegate to any one of their number or ' . . . to "' any manager, attorney or agent any of the powers, authorities "' and discretions for the time being vested in the directors . . . "' any such appointment or delegation may be made in such "' terms and subject to such conditions as the directors may think "' fit, and may include a power to sub-delegate, and the directors "' may at any time remove any person so appointed and may "' annul or vary any such delegation, but no person dealing in "' good faith and without notice of such annulment or variation "' shall be affected thereby.' I think that the result of that "article, the law being as I understand it, is that, there being in "fact power to confer that authority on Mr. Barber, so far as "Mr. Rawlings was concerned, it must be taken that he in fact "had the authority which he was purporting to exercise."

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[52] [1927] 1 K.B. 246.
[56] [1933] A.C. 1, 17.
[57] (1938) 159 L.T. 482.

To that I can only say that there was no evidence that Mr. Rawlings ever knew of the existence of the power conferred by

[58] 159 L.T. 482, 484.

article 12, and there was no evidence that he ever relied on such a power having, as he thought, been exercised by a proper delegation to the chairman and acting managing director.

If the decision of that case proceeds on that footing, namely, the application of the rule in *Royal British Bank* v. *Turquand*,[59] where there was no actual knowledge or reliance on the company's articles of association, then I can only respectfully say that I think the decision inconsistent with the decision of the Court of Appeal in *Houghton's* case [60] and in the *Kreditbank Cassel* case.[61] If, on the other hand, it proceeds on the footing that a chairman of a board taking orders for the sale of the company's bricks, the company's bricks being duly delivered by the company to the buyer on the faith of those orders, has implied, that is to say, actual although not express, authority to receive payment for the goods he is empowered to sell, then there is nothing inconsistent with those decisions or, indeed, anything in the case, to deal with ostensible or apparent as opposed to actual authority at all.

I desire to acknowledge my indebtedness to a most illuminating analysis of the apparent authority of an agent of a company, written by Professor J. L. Montrose in the 1934 Law Quarterly Review, at p. 224. I agree with the conclusions of Professor Montrose and disagree with the contrary conclusions arrived at by the late Sir Arthur Stiebel in an article entitled "Ostensible "Powers of Directors," which is contained in the 1933 Law Quarterly Review, at p. 350.

I hold that I am bound by the decision of the Court of Appeal in the *Houghton* case.[60] If I had not been so bound, I should have arrived independently at precisely the same conclusion. I have already found as a fact there was no actual authority, express or implied, and I find, in so far as it is a question of fact as a fact, and in so far as it is a question of law, as a matter of law, that there was no apparent or ostensible authority on which the plaintiff company, or Wedderburn, was entitled to rely. Ostensible or apparent authority must be something emanating from the company and not from the person who seeks to defraud it. In the result there will be judgment for the defendants, with costs.

Judgment for the defendant company.

Solicitors: *Biddle, Thorne, Welsford & Barnes; Kingsley, Napley & Co*

S. C.

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[59] 6 E. & B. 327.

[60] [1927] 1 K.B. 246.

[61] [1927] 1 K.B. 826.

1952
Feb. 18,
19, 20.

Parker J.

GARRARD *v.* A. E. SOUTHEY & CO. AND STANDARD TELEPHONES AND CABLES LD.

[1949 G. 2608]

Master and Servant—Negligence—Services of workman hired out by employer—Workman injured by negligence of hirer—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145)—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151.

By an oral agreement, later put into writing, the general employers of a workman lent his services for hire to temporary employers to carry out electrical work at premises under reconstruction as a factory. The foreman of the temporary employers not only told the workman what work to do but specifically controlled the way in which he did it. In particular, he told the workman, who asked for a ladder and trestle to carry out the work, that he should look around and find what equipment he needed.

To fix wiring along a girder, the workman used a builders' trestle, which was on the premises but was not the property of the temporary employers. This the workman did not know. In coming down, he held on to a defective rung of the trestle which broke away, and he fell backwards, sustaining injuries.

The injured workman sued both his general and his temporary employers for damages:—

Held, that the temporary employer was in the relation of master and servant with the workman, and so liable to him for breach of duty to take reasonable care to provide proper plant and equipment for the work.

Test in *Mersey Docks and Harbour Board* v. *Coggins & Griffith* (*Liverpool*) *Ld.* [1947] A.C. 1 applied.

ACTION.

The plaintiff, Leslie George Garrard, was in the regular employment of the first defendants, Messrs. A. E. Southey & Co. Ld., as an electrician. By an oral agreement made in March, 1949, between Messrs. Southey and the second defendants, Standard Telephones and Cables Ld., the first defendants agreed to let the services of the plaintiff and other workmen to the second defendants for the purpose of installing electrical equipment at their premises at Boreham Wood, Elstree, which were being reconstructed for use as an assembly shop.

On March 23 the first defendants set out in writing the terms on which they were prepared to let Standard Telephones hire the services of the workmen, and on March 27 those terms were orally accepted by Standard Telephones, who stated that they wanted

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

the workmen to begin work at once, and that a formal order would be sent in due course, accepting the terms of hire. A similar course of action had been followed by the two firms in 1948.

On March 28 two of the hired workmen came to the premises, and the plaintiff followed early in April. They were put under the charge of Mr. Forrester, the foreman of the maintenance department, who told them what to do, sometimes explaining it orally and sometimes giving them plans to work to. Thereafter they worked exclusively at Boreham Wood; they booked in in the mornings and booked out in the evenings; they used the canteen and conformed to the same hours of work as Standard Telephones' employees.

All that they brought with them were small tools of their own, and the foreman told them that they could have all the tools and materials they needed out of his maintenance department. The foreman was a highly skilled electrician, and while the plaintiff and his fellow workmen were skilled electricians, they did not have the same experience and skill as the foreman, and were not experienced in installing power in factory premises. The foreman was in charge of them and supervised their work, telling them not merely what work they were to do, but how to do it. In particular, he told them exactly how they were to carry out the wiring for the power, what wire to use, what switches to use, what fuses to use, and generally how to do the job; and where the practice of the first defendants in carrying out electrical work did not conform to that of the second defendants, the foreman required them to do the work in his way, even to the extent of undoing work done and doing it again.

The foreman, who had ladders and platforms in his maintenance stores for the use of workmen requiring to work at any height, told the plaintiff and his fellow workmen, when they asked him for a ladder or trestle, that there were plenty about the place and that they should look around and find them.

On April 20, 1949, two pairs of builders' trestles were standing upright in the middle of the shop. The plaintiff and his mate took the trestles to fix tubing and wire along a girder. In coming down, the plaintiff held on to the top rung of this trestle, which came away in his hand, because the tenon of the rung had completely rotted away at one end, and he fell over backwards, suffering injuries. That builders' trestle, unknown to the plaintiff, belonged to a firm of building contractors, Messrs. Davey Estates Ld., who had also been working on the reconstruction of these factory premises.

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On the same day, namely, April 20, the second defendants issued their formal order for the work. On the back of the order was a condition that the first defendants should indemnify the second defendants against claims for injuries, etc. That condition was not accepted by the first defendants until April 26.

The plaintiff claimed damages for personal injuries, suing both his general employers, the first defendants, and his temporary employers, the second defendants, for breach of the common law duty of master to servant to take reasonable care to provide proper plant and equipment. Alternatively, he claimed against his general employers for breach of the Building (Safety, Health and Welfare) Regulations, 1948; and in the further alternative against the temporary employers for breach of duty under the Factories Act, 1937.

The first defendants denied liability on the ground that the plaintiff was at the material time in the employment of the second defendants, in such a way as to establish between them the relationship of master and servant; and they claimed in third party proceedings to be indemnified by the second defendants. The second defendants denied liability. They also counterclaimed against the first defendants on the basis of the condition as to indemnity contained in the written order accepted by the first defendants after the accident, but no report on this point is called for.

Martin Jukes for the plaintiff.
Desmond Fitzgerald for the first defendants.
R. Marven Everett for the second defendants.

The arguments appear clearly from the judgment.

Parker J. stated the facts and continued:—The first question to determine is who, at the time of the accident, was the master of the plaintiff, as the person who would owe the duty of a master to his servant to provide proper plant and equipment. Of course, the plaintiff remained throughout in the general employment of Messrs. Southey & Co. They paid his wages and stamped his cards and had the right—and the sole right—to dismiss him from employment; but it is said that in the particular circumstances of this case he was nevertheless at the time of the accident in the special employment of Standard Telephones.

What is the test to apply, in the circumstances, to determine whether at the particular moment of this accident the workman had come into a relationship of master and servant with the people to whom he had been lent. The question has arisen many times, and usually arises where an employee who has been lent has negligently injured a third party, and the question then arises: who is liable for his negligence? Is it the general employer, or is it the person to whom he has been lent? The authority that one looks to in considering that question is *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ld.*[1] In that case a crane and a driver had been lent; the driver in operating the crane had injured a third party, and the question was whether it was the general employer of the crane driver who was liable for his negligence, or the person to whom the crane and driver had been lent. Lord Simon said[2]: "It is not disputed that the "burden of proof rests on the general or permanent employer" —in that case the Mersey Docks & Harbour Board—"to shift "the prima facie responsibility for the negligence of servants "engaged and paid by such employer so that this burden in a "particular case may come to rest on the hirer who for the time "being has the advantage of the service rendered." Then he went on[3]: "And, in my opinion, this burden is a heavy one and "can only be discharged in quite exceptional circumstances," and later he laid down the test which he thought should be applied in those circumstances[4]: "I would prefer to make the "test turn on where the authority lies to direct, or to delegate "to, the workman, the manner in which the vehicle is driven. "It is this authority which determines who is the workman's "'superior.'"

Lord Porter said[5]: "Many factors have a bearing on the "result. Who is paymaster? who can dismiss? how long the "alternative service lasts? what machinery is employed? have all "to be kept in mind. The expressions used in any individual "case must always be considered in regard to the subject-matter "under discussion but amongst the many tests suggested I think "that the most satisfactory, by which to ascertain who is the "employer at any particular time, is to ask who is entitled to "tell the employee the way in which he is to do the work upon "which he is engaged. If someone other than his general "employer is authorized to do this he will, as a rule, be the "person liable for the employee's negligence. But it is not "enough that the task to be performed should be under his

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[1] [1947] A.C. 1.
[2] Ibid. 10.
[3] Ibid. 10.
[4] Ibid. 12.
[5] Ibid. 17.

" control, he must also control the method of performing it. It " is true that in most cases no orders as to how a job should be " done are given or required: the man is left to do his own work " in his own way. But the ultimate question is not what specific " orders, or whether any specific orders, were given, but who is " entitled to give the orders as to how the work should be done. " Where a man driving a mechanical device, such as a crane, is " sent to perform a task, it is easier to infer that the general " employer continues to control the methods of performance since " it is his crane and the driver remains responsible to him for its " safe keeping."

Lord Uthwatt said[6]: " To establish the power of control " requisite to fasten responsibility on him "—that is, on the hirer —" the hirer must in some reasonable sense have authority to " control the manner in which the workman does his work, the " reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) " is carried out that determines its lawful or wrongful character. " Unless there be that authority the workman is not serving the " hirer, but merely serving the interests of the hirer, and service " under the hirer in the sense I have stated is essential. Whether " there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the " arrangement made."

As I have said, nearly all the cases arose where a third party had been injured by the negligence of the lent workman. I have only been referred to one where, as here, it is the workman himself who has been injured, and that is *Holt v. W. H. Rhodes & Son Ld.*[7] That, again, is a case of a crane and a workman being lent to stevedores for the discharge of a ship; and while working for those stevedores he was injured, and claimed that there had been a breach of the duty of master to servant to provide a safe system of working. He sued both his general employers and the stevedores to whom he had been lent. Unfortunately that case is of little assistance because in the way matters went the county court judge—this being a county court appeal in the Court of Appeal—did not make any findings with regard to the relationship between the plaintiff and the stevedores; but it does show that the Court of Appeal thought that the evidence was such that there might possibly be a finding that at the material time the relationship of master and servant existed between the

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[6] Ibid. 21.

[7] [1949] 1 All E.R. 478.

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plaintiff and the stevedores, and the matter was sent back for a new trial.

I am not altogether convinced that the approach is necessarily the same in the two cases, that is to say, in the case where a workman who has been lent has injured a third party and the case, as here, where he himself has been injured. As Lord Simonds pointed out in the *Mersey Docks & Harbour Board* case,[8] where, as in that case, a workman and a crane have been supplied, it is the duty of the general employers to provide a proper crane and a skilled driver, and, that being their duty, it would require exceptional circumstances to fix the responsibility on to some other person for the accident caused by the unskilful act of the driver. On the other hand, when one is considering a case such as the present, there is something to be said for the view that it would be strange if the person to whom the employee was lent, who was himself the occupier of the factory, who was himself providing all the tools, who was himself providing all the equipment and advising on the system of working, could, as it were, fix the responsibility for providing safe plant and equipment on the general employers, who would in those circumstances have no control over him.

Again, it seems to me that there is a distinction to be drawn between cases such as the *Mersey Docks & Harbour Board* case,[8] where a complicated piece of machinery and a driver are being lent, and the case where labour, and labour only, not necessarily of a highly skilled character, is lent. In the former case it is easy to infer that the general employer does not intend to permit the hirer to have control over his valuable piece of machinery, control in the sense of being able to tell the workman how to work it. On the other hand, when it is a matter of labour only and, perhaps, labour which is not very highly skilled, it seems to me much more easy to infer that the hirer should not merely control in the sense of being able to tell the workman what he wants doing, but control the manner of doing it as well.

Be that as it may, applying the strict test laid down in the *Mersey Docks & Harbour Board* case,[8] and recognizing the heavy burden referred to in that case which rests on the general employer to shift the responsibility on to the particular employer, it seems to me that in this case what the foreman did, and what he was entitled to do, went far beyond a matter of general control. He was entitled to tell, and did tell, the plaintiff how to do the work.

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[8] [1947] A.C. 1.

It was argued on behalf of Standard Telephones that really the conclusive test in these cases is: who has the power to dismiss?—which undoubtedly in this case remained solely in Southey & Co.; but as I read the cases, it is nowhere suggested that that is the conclusive test or the sole test. All the matters referred to by Lord Porter in the *Mersey Docks & Harbour Board* case [9] have to be taken into consideration.

The next question, therefore, is whether Standard Telephones are in breach of the duty owed by a master to his servant. It was emphasized, and I fully recognize, that of course the master does not warrant the safety of any plant which is supplied. His only duty is to take reasonable care to provide proper plant and equipment. Here the foreman had under his charge in the maintenance department, in particular, four platform ladders, with a platform at the top which could be used as a table by people working up the ladder. He also had four extension ladders and four 6ft. step ladders. That was plant which was kept available for maintenance work, and it was no doubt ample for that work, and was not at any time all in use; but I am satisfied on the evidence that when there was work of reconstruction to do, as in this case, that equipment was not fully adequate. In particular, it was not fully adequate because of the difficulty which the foreman always had, and fully recognized, of never being able to get workmen at the end of the day to put their tools and ladders back where they should go, presumably in the maintenance store. So if any one man wanted a pair of steps at any particular moment he could not go to the maintenance store and get them, but would have to go through the very extensive premises of Standard Telephones at Boreham Wood to find what he wanted.

I am satisfied on the evidence that, at some time in 1949 before this accident occurred, both the plaintiff and his fellow workman did go to the foreman asking for ladders, or trestles, and that he told them that there were plenty about but that they would have to go and find them. It happened that for some weeks before this accident Davey Estates Ld. had been doing some building work in these premises, and they had, at the back end of the premises, a heap of builders' rubble, breeze blocks and some plant. In particular, they had two pairs of builders' trestles which sometimes lay on that heap and sometimes were stacked against the wall, but on April 20 these two pairs of builders'

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[9] [1947] A.C. 1, 17.

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trestles were standing upright in the middle of the shop, and the plaintiff and his mate had only a ladder between them. They were going to put wire along the top of a girder and both needed ladders or something on which to get up, and the plaintiff took one of these trestles. He said that he did not know that the trestle he was taking belonged to other builders, and he certainly thought, especially after what the foreman had said, that he would be entitled to take and use this trestle.

What is the position in those circumstances? It is argued for Standard Telephones that the taking of this trestle by the plaintiff was an unauthorized act and that the plaintiff by such an unauthorized act cannot, as it were, enlarge the duty in respect of plant laid on Standard Telephones; but in the circumstances of this case I cannot treat the plaintiff's act as an unauthorized act. He was doing, it seems to me, just what he had been told to do when he was in need of plant—namely, to look around and take what he could find. The position here is very little, if any, different from what it would have been if the foreman had expressly said: "There is some of Davey Estates' "plant; use it." If so, it could not be said that Standard Telephones had taken reasonable care to provide that plant, because they had never examined it.

It was argued, assuming that the assumptions which I have made are correct, that the foreman was entitled to rely on the skill and judgment of Davey Estates Ld.; it was said that as they had their trestle there, they should have examined it to see that it was in order, and in that connexion I was referred to *Hodgson* v. *British Arc Welding Co. Ld. and B. and N. Green and Silley Weir Ld.*[10] In that case an employee of sub-contractors was injured by faulty scaffolding put up by the main contractors, who were shipwrights working on and occupying a ship. Hilbery J., on the evidence in that case, found that it was the custom in those circumstances for the main contractors, the shipwrights, to erect the scaffolding which not only their employees, but the employees of their sub-contractors would use. It was clearly a very sensible practice and custom because the shipwrights, and only the shipwrights, would have the special equipment and the special knowledge for erecting scaffolding in ships; and, there being such a custom and practice, Hilbery J. in that case held that there was no duty on the sub-contractors, the employers, to take reasonable care, by themselves sending an inspector or otherwise to see that the scaffolding erected by the shipwrights was in order. Those were very special facts, and it seems to me that the principle there is quite inapplicable to the circumstances of this case. In a case such as this the employer, to escape liability, must show that he has personally taken reasonable steps to see that the plant is safe: see *per* Lord Maugham in *Wilsons and Clyde Coal Co. Ld.* v. *English.*[11] It follows, in my view, that as the burden of this test on masters is so heavy, much as one sympathizes with the foreman and Standard Telephones, I cannot say that the common law duty was observed.

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[10] [1946] K.B. 302.

There is an alternative claim against the general employers, Southey & Co., based on the Building Regulations of 1948. Regulation 4[12] provides that those regulations, however, only apply where "a contractor or employer of workmen is undertaking any of the operations to which these regulations apply." Assuming, as I do, that electrical installation comes within those operations, nevertheless, if what I have found is correct, Messrs. Southey & Co. were not undertaking the operation. The persons who were undertaking the operation were Standard Telephones, through the two men who were in a relationship of master and servant with them.

It is also said, in the alternative, that Standard Telephones are liable for a breach of duty under the Factories Act, 1937. That claim must also fail, because on the evidence here no persons were employed on manual labour on any of the manufactures or processes, the carrying on of which, by section 151, make the premises a factory. These were really premises which were being altered and reconstructed with a view to becoming a factory, but at the material time, in my view, this was not a factory.

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[11] [1938] A.C. 57, 87.

[12] The Building (Safety, Health and Welfare) Regulations, 1948, provide: "4. It shall be the duty of "every contractor and employer of "workmen who is undertaking any "of the operations to which these "Regulations apply—(i) to comply "with such of the requirements of "Regulations . . . as affect any work"man employed by him, provided "that the requirements of the said "Regulations shall be deemed not to "affect any workman if and so long "as his presence in any place is not "in the course of performing any "work on behalf of his employer or "is not expressly or impliedly autho"rized or permitted by his employer; "(ii) to comply with such of the "requirements of Regulations . . . as "relate to any work, act, or opera"tion performed or about to be "performed by such contractor or "employer of workmen; and it shall "be the duty of every contractor and "employer of workmen who erects or "alters any scaffold to comply with "such of the requirements of Regu"lations 5–30 as relate to the erection "or alteration of scaffolds having "regard to the purpose or purposes for "which the scaffold is designed at the "time of erection or alteration; and "of every contractor and employer of "workmen who erects, instals, works "or uses any crane . . . to which any "of the provisions of Regulations . . . "applies, to erect, instal, work or "use any such crane . . . in a "manner which complies with these "provisions."

Regarding, therefore, the position between the plaintiff and the two defendants, the claim succeeds against Standard Telephones Ld. for breach of common law duty.

[His Lordship assessed the damages at £682 12s. 6d. for the plaintiff against Standard Telephones and dismissed the claim against the general employers. His Lordship then considered and dismissed the claim for indemnity by Standard Telephones against Southey & Co.]

Judgment for plaintiff against second defendants.

Claim of plaintiff against first defendants dismissed.

Counterclaim by second defendants against first defendants dismissed.

Solicitors: *Rowley, Ashworth & Co.; Elliot & Macvie; Carpenters; Nelson Baldwin & Co.*

VAMVAKAS v. CUSTODIAN OF ENEMY PROPERTY AND ANOTHER.

1952
Feb. 11, 12, 13, 14, 27.

Ormerod J.

[1950 V. No. 289.]

Emergency Legislation—Trading with the enemy—Custodian of Enemy Property—Meaning of "enemy"—Involuntary residence in enemy territory—Order vesting property in custodian—Whether power of sale excluded—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 2, 7.

In 1937 3,000 gold sovereigns were placed to the credit of the plaintiff, a Greek subject, at a bank in London; at that time the plaintiff was living in Athens but his business required him to spend much of his time in Rumania where, in 1939, he went to live with his wife and family at his brother's house. On February 15, 1941, Rumania was declared to be enemy territory within the meaning of the Trading with the Enemy Act, 1939. From November, 1940, until April 6, 1941, when Germany declared war on Greece, it would have been dangerous, and after that date it was impossible, for the plaintiff to leave Rumania. In May, 1942, the Board of Trade made an order under section 7 (1) (*b*) of the Trading with

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the Enemy Act, 1939, vesting the plaintiff's sovereigns in the Custodian of Enemy Property and giving the custodian power to sell them; by the direction of the custodian the sovereigns were sold to the Bank of England. In January, 1949, the plaintiff applied for the release of his assets and was credited with the proceeds of sale but was unable to obtain the return of the sovereigns. In an action by the plaintiff against the custodian and the Bank of England claiming the return of the sovereigns or their value or damages for conversion on the grounds that at the material times he was not voluntarily resident in enemy territory and, therefore, he was not an enemy, nor were the sovereigns enemy property within the meaning of section 2 (1) (*b*) and section 7 (8) (*a*) respectively of the Trading with the Enemy Act, 1939, and that in any event as the beneficial ownership of property vested in the custodian was in suspense, the Board of Trade, in making a vesting order under section 7 (1) (*b*) of the Act had had no power to order a sale:—

Held, (1) that at common law an individual to be an enemy must be voluntarily resident in enemy territory, but that the circumstances under which the question of enemy status may arise at common law are substantially different from those arising under the Trading with the Enemy Legislation where the principal consideration is the administration of property in this country belonging to individuals resident in enemy territory lest that property should be used to the advantage of the enemy; that residence in section 2 (1) (*b*) of the Trading with the Enemy Act, 1939 means de facto residence irrespective of circumstances; that even if it had been impossible for the plaintiff to leave Rumania during the relevant period he was none the less de facto resident there and that therefore he must be regarded as having come within the statutory definition of enemy and the sovereigns as having been enemy property at the material times.

Dictum of Roxburgh J. in *In re Hatch* [1948] Ch. 592, 599 followed.

(2) That although the effect of an order vesting property in the custodian is to place in suspense the beneficial ownership of the property, on a sale by the custodian the beneficial ownership again attaches to the property and the purchase price remains in the hands of the custodian subject to the same conditions, including the suspension of the beneficial ownership, as the property for which it has been transferred; that that suspension does not affect the custodian's power of sale of the property and that, therefore, in making the vesting order under section 7 (1) (*b*) the Board of Trade had the right to prescribe a power of sale. The plaintiff, accordingly, was not entitled to recover.

In re Münster [1920] 1 Ch. 268 considered.

ACTION.

The following statement of facts is taken from the judgment of Ormerod J. In 1937 the plaintiff lived at Rafina, a suburb of

Athens, with his wife and family, and carried on the business there of a general merchant which required him to spend much of his time in other European countries, particularly Rumania, where his brother in Bucharest carried on a similar business. In 1937 he arranged that his brother should transfer to his credit at the Westminster Bank, Foreign Branch Office, London, 3,000 gold sovereigns, which were the subject of this action.

In August, 1939, the plaintiff contracted to supply 500 horses to the Greek Army, and in consequence went to Bucharest, taking his wife and children with him; he lived there at the brother's house, and, until October, 1947, spent all his time in Rumania, with the exception of short visits to Greece in October 1939, April 1940 and September 1940. The horse contract was completed by about October 10, 1940, but the plaintiff then concerned himself with the charter of a ship to take petrol from Rumania to the Greek Army. The ship made some three voyages on the plaintiff's behalf, the last being about February, 1941. The horse contract was financed partly by the plaintiff and partly by his brother; the petrol contract was financed by his brother, and the plaintiff did the technical work. During the time that the plaintiff was engaged on the petrol contract he was also disposing to Rumanian peasants and others about 300 surplus horses which the Greek Army authorities had not accepted.

In October, 1940, Italy declared war on Greece. German troops began to gather on the Rumanian frontier, and Germans in civilian clothes began to infiltrate into Rumania. A revolution took place in Rumania in December, 1940, and January, 1941, which resulted in General Antonescu and the Iron Guard being in control of the country. On February 15, 1941, Rumania was declared to be enemy territory within the meaning of the Trading with the Enemy Act, 1939, and shortly after this the Greek Consulate in Bucharest was closed down. Before the Consul left he advised the plaintiff and other Greek subjects in Bucharest to "lie low." On April 6, 1941, Germany declared war on Greece, and from that date the plaintiff was unable to leave Bucharest and was not allowed to carry on any business. He lived as best he could with his wife and family in two rooms in Bucharest and was in constant fear of arrest. He was imprisoned in August, 1941, by the Rumanians for a period of six weeks without any charge being brought against him, and in 1944 was arrested by the Germans but escaped after six or eight weeks' imprisonment. His evidence was that when Axis troops were concentrating on the frontier in November and December, 1940, it would have been suicide to try to get through, but that in any event he was morally obliged to remain in Bucharest as he had assumed the responsibility for the petrol transaction. From June 3, 1937, to September 30, 1940, he only spent a total of five months in Greece, but it was his business to go backwards and forwards. He did not spend all his remaining time in Rumania, but that country was his "centre of movement." On September 5, 1941, the Westminster Bank made a return to the Custodian of Enemy Property showing that they held the 3,000 gold sovereigns in question on behalf of the plaintiff, whose address was given as Bucharest. On May 22, 1942, the Board of Trade, in pursuance of powers contained in section 7 (1) (*b*) of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, made an order vesting the sovereigns in the Custodian of Enemy Property and giving the custodian power to sell them. On June 19, 1942, the custodian directed the Westminster Bank to sell the sovereigns to the Bank of England, and this was done for the sum of £5,887 10s. 0d., the price then ruling. The proceeds of sale were paid by the Westminster Bank to the custodian and held by him. The plaintiff was able to return to Athens from Rumania in October, 1947, and on January 11, 1949, through the Westminster Bank, applied to the custodian for the release of his assets. The sum of £5,839 5s. 0d., the proceeds of the sale of the gold and a small balance on his current account, less certain fees and charges, was paid to his credit at the Westminster Bank, but he was unable to obtain the restoration of his holding of gold sovereigns.

The plaintiff claimed against the custodian, the first defendant, and the Bank of England, the second defendant, damages for conversion, and against the Bank of England a declaration that on payment of the sum of £5,762 8s. 2d. he was entitled to have delivered up 3,000 gold sovereigns, on the grounds that he was not an enemy nor were the sovereigns enemy property within the meaning of the Trading with the Enemy Act, 1939, and that, in any event, the Board of Trade had no power to include a power of sale in the vesting order. Both defendants denied conversion, and the second defendant denied wrongful detention of the sovereigns; they contended that at all material times the plaintiff was an enemy for the purposes of the Trading with the Enemy Act, 1939, and, alternatively, that if at any material time the plaintiff was not an enemy, he was at all material times believed to be an enemy, and both defendants relied on section 7 (3) of the Act.

Diplock Q.C. and *Gilbert Dare* for the plaintiff. Enemy is defined by section 2 (1) (*b*) of the Trading with the Enemy Act, 1939, as " . . . any individual resident in enemy " territory . . ." but the test of whether an individual is an enemy for the purposes of the Act must be whether his residence in enemy territory is voluntary or not: see *Porter* v. *Freudenberg.*[1] That was the test used during the 1914–1918 war and also during the 1939–1945 war: see *Vandyke* v. *Adams*[2] where Farwell J. considering the terms of section 2 (1) of the Trading with the Enemy Act, 1939, said[3] " No doubt, it is true in one sense that " the defendant is resident in enemy territory, but he is so " resident only under force majeure. If the language of the " definition in the Act alone fell to be considered, it might be " thought wide enough to include a soldier who is detained " as a prisoner of war in enemy territory, but when the whole " scope of the Act and the purposes for which it was passed are " regarded it appears plain that such a person does not fall within " the definition and is not to be deemed an 'enemy' for the " purposes of the Act." In *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*[4] the real point was whether the German occupation of Holland was of such a character as to make it enemy territory, but the position and status of enemy aliens were considered in detail and Lord Simon said[5]: " On the main question, it is, of course, common ground " that an 'alien enemy' cannot sue in the King's courts or other" wise take up the position of an actor in British litigation save " under royal licence. An alien enemy, in this connexion, does not " mean a subject of a state at war with this country, but a person, " of whatever nationality, who is carrying on business in, or is " voluntarily resident in, the enemy's country; *Porter* v. " *Freudenberg.*"[6] In *Porter* v. *Freudenberg*[7] residence was translated into voluntary residence and domicile was used in the sense of settled or commercial residence. The sole departure from that test is found in *In re Hatch*[8]; the arguments in that case have not been reported so that—apart from *Vandyke* v. *Adams*[9]—the authorities to which the judge was referred are not known. It is submitted that *In re Hatch*[8] cannot be reconciled with *Vandyke* v. *Adams*[9] and that it is inconsistent with the authorities and should be distinguished.

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[1] [1915] 1 K.B. 857.
[2] [1942] Ch. 155.
[3] Ibid. 157.
[4] [1943] A.C. 203.
[5] [1943] A.C. 203, 209.
[6] [1915] 1 K.B. 857.
[7] Ibid. [in particular see p. 869].
[8] [1948] Ch. 592.
[9] [1942] Ch. 155.

"Enemy" was not defined in the Trading with the Enemy Act, 1914, but the preamble to the Trading with the Enemy Amendment Act, 1914, refers to "enemies" as "persons . . . "resident or carrying on business . . ." in enemy territory; it is submitted that is nothing more than a statement of the common law definition of enemy and must be interpreted as meaning voluntarily resident. The Trading with the Enemy Act of 1939 repealed the existing legislation but section 7 (1)[10] re-enacts, in substantially the same words, the preamble to the Act of 1916 and must be interpreted in the same way. In order for property to vest in the custodian under section 7 (1) it must be enemy property, but in this case the evidence shows that the plaintiff was not (except for one month) resident in Greece but at the relevant time was in Rumania, which he was unable to leave; he was not, therefore, voluntarily resident in enemy territory and it is submitted that he was not an enemy and that the sovereigns could not have been enemy property within the meaning of section 7 (8) (*a*)[11] and that the Board of Trade had no power to make an order vesting them in the custodian.

Even if the Board of Trade had the power to make the order there was no power under the statute to include in that order a power of sale. If it is desired to dispose of enemy property the custodian can be given the power to transfer it on behalf of the enemy under paragraph (*c*) of section 7 (1), but paragraphs (*b*) and (*c*) of that subsection are mutually exclusive, and the powers conferred by paragraph (*d*) do not extend those powers but only provide for ancillary powers necessary to carry out an order made under paragraph (*b*) or (*c*). It is submitted that the Board of Trade may vest the property in the custodian, or may give him power to transfer it, but may not vest the property in the custodian and at the same time give him a power of sale. The change between the legislation of 1914 and that of 1939 is due to the fact that when property is vested in the custodian the beneficial interest is in suspense: see *In re Münster.*[12] The custodian, therefore, is incapable of transferring the beneficial ownership to a person who takes with notice of the way in which it has been transferred. *In re Münster*[12] was followed in *In re Gourju's Will Trusts,*[13] where Simonds J. said[14]: "It may be "observed that this legislation differs from that which was passed "during the last war in that under that legislation money pay-"able under a trust, will or settlement was not payable to the "Custodian of Enemy Property except through the operation of "a vesting order: see *In re Hallenstein.*[15] In other respects the "present legislation appears to follow closely in the footsteps of "its predecessor. In particular, although the Solicitor-General "has forcibly argued that here, too, a different result flows from "the slightly different wording of the relevant Acts, I cannot "regard the character in which the custodian receives money "paid to him under the present Act and order as differing from "that in which he received money under the earlier Act. He "does not receive such money as agent for the enemy. He has "certain limited powers of dealing with it, but, apart from that, "the beneficial ownership is to be regarded as in statutory "suspense: see *In re Münster.*[16]"

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[10] Trading with the Enemy Act, 1939, s. 7 (1): "With a view to "preventing the payment of money to "enemies and of preserving enemy "property . . . the Board of Trade "may . . . by order . . . (*b*) vest in "the . . . custodian such enemy "property as may be prescribed, or "provide for, and regulate, the vest- "ing in that custodian of such enemy "property as may be prescribed; "(*c*) vest in the . . . custodian the "right to transfer such other enemy "property as may be prescribed, "being enemy property which has "not been, and is not required by the "order to be, vested in the custodian; "(*d*) confer and impose on the cus- "todians and on any other person "such rights, powers, duties and "liabilities as may be prescribed as "respects—(i) property which has "been, or is required to be, vested in "a custodian by or under the order, "(ii) property of which the right of "transfer has been, or is required to "be, so vested; . . . and any such "order may contain such incidental "and supplementary provisions as "appear to the Board of Trade to be "necessary or expedient for the pur- "poses of the order."

[11] Trading with the Enemy Act, 1939, s. 7 (8) (*a*): ". . . the expres- "sion 'enemy property' means any "property for the time being belong- "ing to or held or managed on "behalf of an enemy or an enemy "subject. . . ."

If the plaintiff is not an enemy alien both defendants rely for protection on subsection (3) of section 7 of the Trading with the Enemy Act, 1939.[17] Where the Crown purports to take away rights of property it is for the Crown to show that the plaintiff comes within the permitted category. It may be that the plaintiff was not properly resident anywhere, but if the custodian had no power to transfer the property, subsection (3) cannot protect him because it is only the property of an enemy which can be vested in the custodian; a piece of paper from the Board of Trade cannot have the effect of vesting property which cannot be vested. It is submitted that section 7 (3) is only relevant where there has been a valid vesting and that here there has not been such a vesting.

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[12] [1920] 1 Ch. 268.

[13] [1943] Ch. 24.

[14] Ibid. 29.

[15] [1922] 1 Ch. 355.

[16] [1920] 1 Ch. 268.

[17] Trading with the Enemy Act, 1939, s. 7 (3): "Where, in pursuance "of an order made under this section, "—(*a*) Any money is paid to a cus-"todian; (*b*) Any property, or the "right to transfer any property, is "vested in a custodian, or (*c*) a direc-"tion is given to any person by a "custodian in relation to any property "which appears to the custodian to be "property to which the order applies, "neither the payment, vesting or "direction nor any proceedings in con-"sequence thereof shall be invalidated "or affected by reason only that at a "material time . . . (ii) some person ". . . who was believed by the cus-"todian to be an enemy or an enemy "subject, was not an enemy or an "enemy subject."

[They then made submissions to the court on the question of damages.]

J. P. Ashworth and *R. J. Parker* for the custodian. It is conceded that " residence in an enemy country " for the purpose of the common law means voluntary residence. It is contended for the plaintiff that under the Trading with the Enemy Act, 1939, the meaning of residence is also voluntary residence, but it is submitted that there is a clear distinction between an enemy for the purposes of the Act and an enemy at common law and that for the purposes of the Act an enemy is not covered by the common law definition. Section 2 (1) (*b*) of the Act defines " enemy " as " any individual resident in enemy territory." The purposes of the Act were (1) to prevent trading with the enemy and (2) to make provisions in relation to enemy property found in this country. Its main object was to draw a line of war round the perimeter of enemy territory as defined in the Act so so to prevent any dealings likely to benefit any one on the far side of the line of war (see *Stockholms Enskilda Bank Aktiebolag* v. *Schering Ld.*[18]). In McNair's Legal Effects of War, 3rd ed., p. 68, the author points out that though in most cases a person who is an enemy alien in the territorial sense at common law would come within the definition of the Act, the statutory enemy may be something other or beyond what the common law enemy may be: see *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V.) Gebr.*[19]

The Trading with the Enemy Act, 1939, cannot be regarded as a re-enactment of the earlier Act. Among other changes introduced by the Act of 1939 was the provision in section 16 that the Act should be without prejudice to the exercise of any right or prerogative of the Crown; the reason for that provision was the decision in *In re Ferdinand*[20] when it was held that the prerogative was in abeyance by reason of the legislation passed during the first world war.

[18] [1941] 1 K.B. 424.

[19] [1943] A.C. 203.

[20] [1921] 1 Ch. 107.

In *Vandyke* v. *Adams*[21] the person whose residence was in question was a prisoner of war; that case was one which was never contemplated by the Act and was totally different from *In re Hatch.*[22] Contrary to the contentions put forward on behalf of the plaintiff the decisions in *In re Hatch*[22] and *Vandyke* v. *Adams*[21] can stand together. In *In re Hatch* Roxburgh J. said[23]: "As the Trading with the Enemy Legislation is legislation which "has to be applied and acted on during war and under warlike "conditions, it would be surprising if 'residence' meant anything "more complicated than de facto residence irrespective of circum-"stances, for it would, in most cases, be impossible to investigate "the circumstances during a war." Any other interpretation of "residence" would give rise to overwhelming administrative difficulties which Parliament would have foreseen and avoided and cannot have intended. If that be wrong it is submitted that the plaintiff's residence in enemy territory was voluntary but, whether it was so or not the mere fact that he was in Rumania at the material time made him an enemy within the Act.

With regard to the second contention for the plaintiff it is submitted that section 7 (3) is only applicable if the first submission made on behalf of the custodian is wrong.

As to the question raised relating to the custodian's power of sale, this is the first case in which the question has been raised, whether a custodian, in whose favour a vesting order has been made, is entitled to sell the property so vested in him. See, for example, *Bank voor Handel en Scheepvaart N.V.* v. *Slatford and Another*[24] where the power of sale was not questioned. If such power is to be excluded it must be excluded either by express words or by necessary implication which are lacking here. Section 7 of the 1939 Act should be compared with section 4 of the Trading with the Enemy (Amendment) Act, 1916,[25] which was the framework on which the Act of 1939 was built but the power contained in section 7 of the latter Act is much wider in its form and applies to other persons than the custodian. It is submitted that had it wished to do so Parliament could have omitted to confer a power of sale by transfer of possession.

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[21] [1942] Ch. 155.

[22] [1948] Ch. 592.

[23] Ibid. 599.

[24] [1951] W.N. 494; [1951] 2 T.L.R. 755.

[25] The Trading with the Enemy (Amendment) Act, 1916, s. 4 (1): "The Board of Trade . . . may by "order vest in the custodian . . . any "property . . . belonging to . . . an "enemy . . . and may by any such "order . . . confer on the custodian "such powers of selling, managing "and otherwise dealing with the "property as to the Board may seem "proper."

Although it is maintained that paragraph (*c*) of section 7 (1) provides a short cut for transfer of property if it has been vested and it is necessary to divest it, reliance is placed entirely on paragraph (*d*); a wide range of property may be transferred under this paragraph which catches an enemy subject as well as an enemy, and which must include a power of sale to render it effective. It is difficult to find a practical limit to paragraph (*d*) and almost impossible to read any limitation into it.

In the light of the evidence the conclusion is inescapable that the officers concerned with this matter in the custodian's office believed on good grounds that the person in question was an enemy and it is submitted that if it be held that he was not an enemy section 7 (3) will apply.

[They then referred to the submissions made on behalf of the plaintiff relating to damages.]

Harcourt Barrington for the Bank of England. It is conceded that an individual must be voluntarily resident in enemy territory to constitute him an enemy at common law; it is, however, sufficient if the residence was voluntary up to the time when the territory became enemy territory; after that date a resident's status as an enemy is not affected by whether he remained in that territory voluntarily or under compulsion.

The contention that the effect of a power of sale is to put back the beneficial ownership, provided that the purchaser had notice, raises the question of what should the purchaser have notice? If it were of defect in the custodian's title the effect would be to make most of these sales invalid; in law and in fact the custodian in these cases sells to the Bank of England under a duty imposed by regulation 4 of the Finance Regulations, 1939. What is there, therefore, for the Bank to have notice of? The sovereigns were sold through a bullion broker and there would have been no actual segregation of the plaintiff's sovereigns. In actual fact there is no proof that the Bank of England had any notice, either of the plaintiff and his holding, the identity of the sovereigns, or even of the identity of the seller.

[The remainder of his argument referred to the question of damages.]

Diplock Q.C. in reply. The argument that *Vandyke* v. *Adams*[26] can be distinguished from *In re Hatch*[27] cannot stand. There can be no valid distinction between the two cases even on the question of voluntary residence; there is no vestige of any authority for the proposition that the position of a prisoner of war is any different from that of a person captured, for example, the day before war was declared. The relevant date in deciding whether the residence was voluntary or not must be the date on which the vesting order was made. If the vesting order was made after it had become impossible for the plaintiff to leave the country, his residence was not voluntary, and the fact that his residence was voluntary up to that date does not make him an enemy. This is not a normal case because the plaintiff in Rumania could not have known when Rumania was declared to be enemy territory; the fact that there was no public Act to that effect must be taken into account.

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[26] [1942] Ch. 155.

[27] [1948] Ch. 592.

There can be no reason for giving the definition of enemy in the 1939 Act a wider meaning than in the previous Acts; any argument to that effect based on administrative difficulties must fail because of the power given to the Board of Trade by section 2 (2) to specify an individual as an enemy in cases of doubt.

If there was a power of sale the beneficial interest revives on sale: *In re Münster.*[28] The onus of proof of a bona fide purchaser for value without notice is on the Bank. It was known that the property was the subject of a vesting order, though not that it belonged to the plaintiff, but that was sufficient to put the Bank on inquiry.

Cur. adv. vult.

February 27. ORMEROD J., in a written judgment, stated the facts as above set out and continued:—The plaintiff claims from the custodian and from the Bank of England the return of the sovereigns, or their value, or damages for their conversion, on the following grounds: (1) That he was not an enemy, nor were the sovereigns enemy property within the meaning of the Trading with the Enemy Act, 1939; and (2) that in any event the Board of Trade in making a vesting order under section 7 (1) (*b*) of the Act had no power to order a sale.

On the first ground it is contended for the plaintiff that the word "resident" in section 2 (1) (*b*) of the Trading with the Enemy Act, 1939, must mean "voluntarily resident," and as the plaintiff at the relevant time was unable to leave Rumania he could not therefore be regarded as resident in enemy territory, and therefore an enemy within the meaning of the section. It was argued that the Act of 1939 repealed the existing legislation which was contained in the Trading with the Enemy Act, 1914, and the two amending Acts of 1914 and 1916; that the Trading with the Enemy Act, 1914, contained no definition of "enemy," but in the Preamble of the Amending Act of 1914 "enemies" are defined as "persons and bodies of persons resident or carrying on business in any country with which His Majesty is for "the time being at war." This, said Mr. Diplock, should be construed as meaning nothing more than a statement of the common law definition of the word "enemy." In *Porter* v. *Freudenberg* [29] Lord Reading includes in his definition of enemy[29] "a British subject . . . who is voluntarily resident . . . in hostile "territory," and this definition has been followed and approved in a number of cases both in the Court of Appeal and in the House of Lords, particularly in *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*.[30] It is argued that as the words in section 2 (1) (*b*) of the Act of 1939 are substantially the same as the words in the Preamble to the amending Act of 1914 they should have the same effect and be construed as meaning "voluntarily resident." I cannot accept that contention. There is no doubt on the authorities that at common law an individual to be an enemy in these circumstances must be voluntarily resident in hostile territory. But the circumstances under which the question of enemy status may arise at common law are substantially different from those arising under the statute. At common law the question most frequently arising is the right or liability of the individual to sue or to be sued, whereas under the statute the principal consideration is the administration of property in this country belonging to individuals resident in hostile territory, lest that property should be used to the advantage of the enemy.

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[28] [1920] 1 Ch. 268.

In *In re Hatch* Roxburgh J. says [31]: "As the Trading with "the Enemy legislation is legislation which has to be applied and "acted on during war and under warlike conditions, it would be "surprising if 'residence' meant anything more complicated than "de facto residence irrespective of circumstances, for it would, "in most cases, be impossible to investigate the circumstances "during a war." Mr. Diplock contends that in cases of doubt the Board of Trade may specify the individual concerned as an "enemy" by virtue of section 2 (2) of the Act, but, in my opinion, that cannot be the object of the subsection. If it were, it would require to be invoked in a very large number of cases, if not in every case, and would indeed render any other definition of "enemy" unnecessary. I have come to the conclusion that I should accept the view of Roxburgh J. that "residence" in this context means "de facto residence irrespective of circum-"stances." If this be right, then I am satisfied that the plaintiff must be regarded as coming within the statutory definition of "enemy." His evidence is that he regarded it as his duty to remain in Bucharest at least until February, 1941, when Rumania was declared to be enemy territory, and that afterwards he accepted, no doubt wisely, the advice of the Consul to "lie low" and not take the risk of attempting to leave the country and return to Greece. It may well be, as he says, that after the declaration of war by Germany on Greece in April, 1941, it was impossible for him to leave. He was, in my opinion, none the less de facto resident in Rumania during the relevant period.

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[29] [1915] 1 K.B. 857, 869.

[30] [1943] A.C. 203.

[31] [1948] Ch. 592, 599.

It is unnecessary, in view of the conclusion to which I have come, to consider whether the custodian would in any event be protected by the provisions of section 7 (3) of the statute.

It is further contended on behalf of the plaintiff that even although the Board of Trade had the power to make an order vesting the gold in question in the custodian, there was no power under the statute to include in that order a power of sale. The power to make vesting orders of enemy property is given to the Board of Trade by section 7 (1) of the statute, which provides that the Board of Trade may by order "(*b*) vest in the prescribed "custodian such enemy property as may be prescribed . . . or "(*c*) vest in the prescribed custodian the right to transfer such "other enemy property as may be prescribed, being enemy pro-"perty which has not been and is not required by the order to "be, vested in the custodian." "Enemy property" is defined by section 7 (8) (*a*) to be any property for the time being belonging to or held or managed by an enemy or an enemy subject. The plaintiff's contention is that paragraphs (*b*) and (*c*) of section 7 (1) are mutually exclusive. The Board of Trade may vest the property in the custodian but may not at the same time give the custodian a power of sale, or may, without vesting the property, vest in the custodian a right to transfer it. Section 7 (1) (*d*) provides that the Board of Trade may confer on the custodian such powers, rights and duties as may be prescribed as respects (1) property which has been vested in the custodian by or under the order, and (2) property of which the right of transfer has been so vested. It is contended by the plaintiff that the powers conferred by paragraph (*d*) do not extend the powers conferred by (*b*) or (*c*), but only provide for such ancillary powers as may be necessary to carry out orders made under (*b*) and (*c*) respectively.

It is interesting to look at the provisions in the earlier statutes. The Trading with the Enemy Amendment Act, 1914, s. 4 (1), provides that "The High Court or a judge thereof may . . . by "order vest in the Custodian any such real or personal property "as aforesaid . . . and may by the order confer on the Custodian "such powers of selling, managing and otherwise dealing with "the property as to the court or judge may seem proper." The Trading with the Enemy Amendment Act, 1916, s. 4 (1), transfers this power to the Board of Trade. Why, then, should the statute of 1939 limit the powers of the Board of Trade to prescribe a power of sale only in cases where a vesting order has not been made? Mr. Diplock contends that the reason for this is to be found in the decision of Russell J. in *In re Münster*,[32] a case which dealt with the right of the Special Commissioners to assess a custodian to super-tax as agent or receiver for Prince Münster, an enemy. In dealing with the objection that the custodian's contention involved the existence of a period of time during which there was no beneficial owner of the property, Russell J. said[33]: "That is "quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in "statutory suspense or abeyance during the period in question, "during which period the custodian has certain limited powers "of dealing with the property." This decision was followed in *In re Gourju's Will Trusts*,[34] a case concerning the payment to a widow residing in enemy territory of the income of a trust fund in this country. Simonds J. said[35]: "He (the custodian) does "not receive such money as agent for the enemy. He has "certain limited powers of dealing with it, but, apart from that, "the beneficial ownership is to be regarded as in statutory "suspense."

Mr. Diplock contends that the effect of these decisions is that once a vesting order is made, the beneficial ownership of the property is in suspense and remains in suspense until the signing of a peace treaty or a general release of enemy property. It is to be noted that *In re Munster*[36] deals with the liability of the custodian to be assessed to super-tax on the income of enemy property vested in him, and is in no way concerned with the right of the custodian to sell such property. The case was decided when the Trading with Enemy Amendment Act, 1916, was in force, and if Mr. Diplock's contention is correct would render section 4 of that Act, so far as it related to powers of sale, of no effect as the Board of Trade would have the power to order a sale of the legal estate only, whilst the beneficial ownership would remain in suspense until the happening of the specified future event.

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[32] [1920] 1 Ch. 268.

[33] Ibid. 279.

[34] [1943] Ch. 24.

[35] Ibid. 29.

[36] [1920] 1 Ch. 268.

In my opinion the true effect of *In re Münster* [36] is that although the beneficial ownership of property vested in the custodian is in suspense, the power of sale is not thereby altered. On a transfer of the property by the custodian, the beneficial ownership once again attaches to it, but the purchase price remains in the hands of the custodian under the same conditions as the property for which it has been transferred, including, of course, the suspension of the beneficial ownership. I do not accept, therefore, the contention that the power of the Board of Trade to prescribe a power of sale has been limited because of *In re Münster*,[36] and I do not accept the contention that the Board of Trade may not prescribe a power of sale under section 7 (1) (*d*), in cases where a vesting order has been made under section 7 (1) (*b*). In my view, the object of section 7 (1) (*c*) is to give the right to the Board of Trade to prescribe a power of sale in cases where for any reason it is unnecessary or impracticable to vest the property in the custodian and is not intended to exclude the right to prescribe such a power of sale when a vesting order is made.

The plaintiff further contended that even if the custodian had power to sell the property in question to the Bank of England, the beneficial ownership was still in suspense, and that on a general release of enemy property it would vest in him. This contention was, of course, based on *In re Munster*,[36] and in view of the opinion I have already expressed, it is unnecessary for me to deal with the question further.

It follows, therefore, that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Lucien Fior; Solicitor, Board of Trade; Freshfields.*

J. F. L.

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[36] [1920] 1 Ch. 268.

C. A.

1952
Mar. 12, 13.

Somervell, Denning and Romer L.JJ.

EVERETT *v.* RIBBANDS AND ANOTHER.

[1950 No. 1540]

Malicious Prosecution—Proceedings complained of not ending in plaintiff's favour—Plaintiff bound over and ordered to find sureties—Action not maintainable—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 25.

The rule laid down in *Basebé* v. *Matthews* (1867) L.R. 2 C.P. 684, that in an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceeding complained of terminated in his favour, if from its nature it be capable of such a termination, applies equally where the result of that proceeding was merely that he was ordered to enter into a recognizance to keep the peace and to find sureties for his good behaviour. Since the passing of the Summary Jurisdiction Act, 1879, proceedings with that object are no longer ex parte; evidence may be adduced by the defendant, and the magistrate can now give judgment in his favour, in which event an action for malicious prosecution would lie; but if the decision is against the defendant no action for malicious prosecution will lie.

Steward v. *Gromett* (1859) 7 C.B.N.S. 191; 29 L.J.C.P. 170 distinguished.

Decision of Devlin J. ([1952] 1 K.B. 112) affirmed.

APPEAL from Devlin J.[1]

The plaintiff Everett brought this action against the first defendant, Ribbands, the proprietor of an animal centre, and the second defendant, Farrow, a detective-sergeant of the Metropolitan Police, alleging that they falsely and maliciously required sureties of the peace against him, and that the detective-sergeant, as representing the police, had improperly and illegally made a complaint before a court of summary jurisdiction, in that section 25 of the Summary Jurisdiction Act, 1879, required the personal application of the real complainant as a condition precedent to the ordering of sureties.

In his statement of claim the plaintiff alleged that on July 8, 1950, the detective-sergeant laid an information against him on which a summons was issued. The information was stated to have been laid on behalf of Ribbands, and it alleged that the plaintiff between May, 1941, and June, 1950, had sent offensive postcards and letters through the post to her, and had loitered at her residence with intent to cause a breach of the peace. It called on the plaintiff to show cause why he should not be ordered

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[1] [1952] 1 K.B. 112.

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to find sureties to be of good behaviour. At the hearing Ribbands gave evidence that she was afraid of the consequences of the plaintiff's actions, and the magistrates ordered him to enter into a recognizance, with two sureties in the sum of £20 each, to keep the peace and be of good behaviour for 12 calendar months, or in default to undergo a month's imprisonment.

The plaintiff alleged that the defendants, in requiring sureties, had acted falsely and maliciously and that the proceedings were a deliberate attempt to defeat the ends of justice by hampering him in his campaign against Miss Ribbands' business. He complained that she had "put to sleep" a cat, of which he was very fond, while he was in hospital.

Devlin J., on a preliminary point of law, raised on behalf of the defendants, held that the principle laid down in *Basebé* v. *Matthews*,[2] that in an action for malicious prosecution it is essential to aver that the proceedings complained of terminated in the plaintiff's favour, applied equally where the result of those proceedings was merely that the plaintiff was ordered to enter into a recognizance to keep the peace and to find sureties for his good behaviour, since, by section 25 of the Summary Jurisdiction Act, 1879, such proceedings were no longer ex parte.[3] He therefore held that the plaintiff's action was not maintainable.

The plaintiff appealed.

The plaintiff appeared in person.

Leonard Pearl, for the first defendant, and *Geoffrey Howard*, for the second defendant, were not called on.

SOMERVELL L.J. [after referring to the facts]:—When the case came before the judge he had looked at the pleadings and realized, as the fact was, that the defendants were taking a preliminary objection in law which, if right, was an answer to the whole case. The objection was based on the rule that in actions for malicious prosecution, where what I will call normal proceedings of a criminal nature are concerned, the plaintiff cannot bring proceedings for malicious prosecution unless the prosecution has failed. If he has been convicted the action does not lie. I will come later to the reasons which have been given for that rule, which, it was submitted, applied to the present claim.

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[2] (1867) L.R. 2 C.P. 684.

[3] Summary Jurisdiction Act, 1879, s. 25: "The power of a court of "summary jurisdiction, upon com- "plaint of any person, to adjudge a "person to enter into a recognizance "and find sureties to keep the peace "or to be of good behaviour towards "such first-mentioned person, shall "be exercised by an order upon com- "plaint, and the Summary Jurisdic- "tion Acts shall apply accordingly, "and the complainant and defendant "and witnesses may be called and "examined and cross-examined and "the complainant and defendant shall "be subject to costs, as in the case "of any other complaint."

The submission of the plaintiff before the judge, and before us, was that on the authority of a case in 1859, *Steward* v. *Gromett*,[4] that rule does not apply to this jurisdiction, that is to say, the jurisdiction of magistrates, which goes back for many centuries (though it may have been developed and to some extent modified by decisions in the centuries gone by) to order a person to enter into recognizances to keep the peace and to be of good behaviour; that it was, in other words, not necessary that the proceedings should have failed. It was submitted, however, for the defendants that the basis of that decision, creating this exception to what I will call the general rule, ceased to exist by reason of section 25 of the Summary Jurisdiction Act, 1879.

To see whether that is right one must, of course, look, in the first instance, at the ratio in *Steward* v. *Gromett*.[4] That was what the judge proceeded to do. He cites all the relevant passages from the judgments though, having regard to the argument which has been addressed to us by the plaintiff, I will repeat, at any rate some of the passages which I think show what was the basis of the decision. Erle C.J. said: "The "question is whether the plaintiff had an opportunity of obtain-"ing a determination in his favour on the demand for sureties of "the peace."[5] He decided that the answer to that question was "No," because the application was made ex parte. The position was that the justices were bound to grant the order, provided, of course, that the statements on oath before them satisfied the general conditions for the exercise of the jurisdiction.

Williams J. put it in this way: "In the case of exhibiting "articles of the peace or in the precisely analogous case of "demanding sureties of the peace the proceedings must end "against the plaintiff, because he is not allowed to answer; and "it is manifestly impossible to say, under those circumstances, "that the existence of the proceedings, and the fact that they "have not ended favourably to the plaintiff, is evidence of "reasonable and probable cause for the defendant's instituting "them."[6]

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[4] (1859) 7 C.B.N.S. 191; 29 L.J. C.P. 170.

[5] 29 L.J.C.P. 175.

[6] Ibid. 175.

Crowder J. said (and this is very much in accordance with Erle C.J.): "The question is, whether the plaintiff had the "opportunity of controverting the oath of the defendant before "the magistrates? If he had, the rule applies that it is necessary "for the plaintiff to show a termination of the proceedings in his "own favour." [7]

Byles J., in the earlier part of his judgment, would appear to be following on precisely the same lines. He says: "The only "objection made on behalf of the defendant, as I understand it, "is that the inquiry here had terminated unfavourably to the "plaintiff. Whether that objection is of any force depends upon "whether the plaintiff had the opportunity of being heard in his "own defence." [8] But later in his judgment he does indicate that he would want to reserve the point whether in all cases, even if there is a power to appear, the rule that the proceedings must have resulted in the plaintiff's favour necessarily applied. He refers to the power of challenging the issue of a capias under the Judgments Act, 1838 (1 & 2 Vict. c. 110). So far as I follow the sections there, though I do not think it matters, the capias issued ex parte, though there was a right to challenge it later. That, therefore, was the position, and that was the ratio of it in 1850.

[His Lordship then read section 25 of the Summary Jurisdiction Act, 1879, and continued:] The effect of that section was, of course, that this jurisdiction is no longer to be exercised ex parte. The defendant is before the court and can cross-examine, give evidence, and call witnesses in precisely the same way as in any other proceeding. The judge held that that did remove the basis of the decision in *Steward* v. *Gromett* [9] and brought proceedings of this kind under what I call the general rule.

The plaintiff, in his submission to us, emphasized, first of all, that in proceedings of this kind there is no conviction; that an order of this kind can issue although no criminal offence is disclosed in the complaint. I think that is right. He referred to a passage in Stone's Justices' Manual which says that an order under this procedure is not by way of punishment. It has been said many times that its purpose is to prevent breaches of the peace or other types of act against which an order can be directed. The plaintiff also relied on the fact that there was no appeal except possibly—and this does not seem to have been decided—by way of special case. There is no appeal in the ordinary way to quarter sessions. He also emphasized the general position under this procedure. As he stated, it is of somewhat vague extent and there are very pertinent and wise observations in Stone's Justices' Manual, particularly with regard to the type of case which falls under "good behaviour." He submitted, therefore, that we ought to have regard to the nature of this jurisdiction in considering whether there ought not to be a remedy of the kind which he seeks in these proceedings.

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[7] 29 L.J.C.P. 175, 176.

[8] Ibid. 176.

[9] 7 C.B.N.S. 191; 29 L.J.C.P. 170.

A great deal of what the plaintiff said might be, I think, relevant if anybody was considering the general nature of this jurisdiction and whether it could or could not be more precisely defined. It might also be very relevant if the appropriate authorities were considering whether it would be right to introduce a right of appeal to quarter sessions. But those are not matters with which we are concerned, nor do they, in my opinion, affect the problem which was set to the judge and is now set to us. I can put my reasons for coming to that conclusion quite shortly by referring to one passage from a judgment of Crompton J. in the case of *Castrique* v. *Behrens*,[10] which will be found cited in *Bynoe* v. *Bank of England*.[11] That was a confirmation by this court of what I have called the general rule. The passage is this: "There is no doubt, on principle, and on "the authorities, that an action lies for maliciously and without "reasonable and probable cause setting the law of this country "in motion to the damage of the plaintiff, though not for a mere "conspiracy to do so without actual legal damage. . . . But "in such an action it is essential to show that the proceeding "alleged to be instituted maliciously and without probable cause "has terminated in favour of the plaintiff, if from its nature it "be capable of such a termination. The reason seems to be "that, if in the proceeding complained of, the decision was against "the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for "another court, not being a court of appeal, to hold that the "decision was come to without reasonable and probable cause." The principle is there stated as covering a wider field than prosecutions. Where an action of this kind is brought in respect of civil process the plaintiff has, I think, to show special damage. But the principle is the same and it seems to me clear, having regard to the change made by section 25 of the Act of 1879, that proceedings of this kind before justices are capable of being terminated in favour of the plaintiff. He can appear and give evidence and dispute what is said by the complainant, and he may be believed and, if so, no order will be made. The question is not, is it a prosecution? but, were the proceedings capable of being terminated in the plaintiff's favour? On the first point, therefore, I have come to the conclusion that the judge was right.

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[10] (1861) 3 E. & E. 709, 721.

[11] [1902] 1 K.B. 467, 470.

The plaintiff took a second point, but, with respect, I do not think there is anything in it. He relied on the fact that in the course of these proceedings, after the statement of claim had been delivered, application was made to strike it out as frivolous and vexatious under Ord. 25, r. 4. The main argument put forward was the argument which we are dealing with today. The application was refused. He submitted that a party ought not to be allowed, first of all, to apply under Ord. 25, r. 4, and, if he fails, then to take the point as a preliminary point. In fact, in the ordinary case, where an application under Ord. 25, r. 4, fails there is usually a point to be argued. The court says, as a rule: "This is not a case for striking out those paragraphs; "the point can be argued when the case comes on for trial." So I do not think there is anything in that point.

The plaintiff further complains that the judge, according to the note he has given us, himself raised the question whether this point should be taken as a preliminary point. The jury had been sworn, but this point was argued as a preliminary point before the hearing of the evidence. The plaintiff thought the defendants were going to let him open his case and call his evidence and then take the point. He may be right. Defendants sometimes do not want to give the impression that they are anxious to stifle the case before it starts. But the judge is entitled, as guardian of judicial time and the time of the jury, to decide, as he did here, that this legal argument ought to precede the hearing. If the defendants were right the evidence was irrelevant to any triable issue. That really is an answer to the point which the plaintiff made. He would have liked the judge to hear the evidence and get answers to questions from the jury and then rule on the point of law. No doubt that sometimes is a very proper course and then, if there is an appeal to this court on a point of law and this court thinks the judge was wrong, there are the answers to the questions by the jury which may enable the case to be dealt with. But that is entirely a matter for the trial judge. He came to the conclusion, and we have come to the conclusion, that the point of law taken by the defendants was right, and there is, therefore, clearly no ground on which this appeal could be allowed.

The plaintiff also criticized the actual form of the order and what was done, namely, that the jury was discharged. The alternative course was considered. They could, I imagine, have been directed by the judge to find for the defendants, but that course, on the whole, I think, would have been less favourable to the plaintiff than what the judge did. On any view it would be no ground for ordering a new trial and, so far as I can understand it, after the judge had delivered judgment when the question of the form of order was discussed, the plaintiff, though he had obviously objected to the point of law being argued first, does not seem to me to have objected to the actual form in which the result that had then been arrived at was embodied in the order which was made. For those reasons I think the appeal fails and should be dismissed.

DENNING L.J. This case concerns the very ancient power of a magistrate to require a man to provide sureties. It appears from the old books that it was of two kinds: surety of the peace, which was authorized by the commission of the peace; and surety for good behaviour, which was authorized by the Justice of the Peace Act, 1361 (34 Edw. 3, c. 1). A magistrate could not order a man to find sureties unless just cause was shown on oath. He could not order sureties of the peace unless the accused man had actually threatened the complainant with personal violence, or had lain in wait for him to do him violence. He could not order sureties for good behaviour unless the accused man was of evil fame and had actually threatened to break the law of the land, or by his conduct had evinced an intention to break it. In either case, if the man failed to find anyone to stand surety for him the magistrate could commit him to prison. All this was done without the man being heard at all in his own defence. What happened was that the complainant gave evidence on oath of the relevant facts, and thereupon the magistrate, if satisfied by the oath, could make an order on the man to give sureties. The order might even be made in his absence. The best discussion of this subject before 1879 will be found in Hawkins, Pleas of the Crown, 8th ed. (1824), Vol. 1, cap. 28, and Burns' Justice of the Peace, 30th ed. (1869), Vol. 5, at pp. 743–768.

It is plain that this procedure was not a prosecution. It was a legal process intended to prevent the man from doing wrong.

It was a drastic form of quia timet proceedings. As such it had many parallels in ancient times. For instance, in a civil action, if there was any suspicion that the defendant intended to abscond, a writ of capias would issue to arrest him so as to ensure his attendance in court: see Blackstone's Commentaries, 8th ed., Bk. III, p. 282, and the statute 1 & 2 Vict. c. 110. In these cases where the process of the law was invoked without the other party being heard, it was settled law that the injured party could bring an action for damages if he could show that the process was obtained maliciously and without reasonable and probable cause: *Steward* v. *Gromett.*[12] This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to prove that he had been acquitted. There could be no question of acquittal, because the process issued without his innocence or guilt being decided at all. It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies.

Since 1879 an order for sureties has entirely changed its nature. It has ceased to be a mere legal process and has become a full legal hearing. A complaint has to be served on the defendant and he must be given a full opportunity of being heard in his own defence. The procedure is the same as any other complaint. If the court finds against the defendant, it may order him to find sureties or in default be imprisoned for six months: see section 25 of the Summary Jurisdiction Act, 1879.

The plaintiff argued that, despite this change of procedure, the law remained as it was laid down in *Steward* v. *Gromett.*[12] He said that an order on a man to find sureties was an anomaly, because a man who was friendless and had the misfortune not to be able to find sureties might find himself in prison without being charged with any criminal offence or being found guilty of it. There was, he said, no appeal from the order, and no power to quash it on certiorari. The only possible way of questioning it was by case stated on a point of law; and that was no remedy in the case of perjury by the complainant. He urged, therefore, that there should be a remedy by an action for malicious process, even though an order had been made against him.

If I thought that an order to find sureties was today a mere legal process, as it was before 1879, I would be in favour of the plaintiff's argument. But I do not think it is today a mere legal process. It now bears many of the characteristics of a criminal proceeding. The procedure is much the same as in the case of a summary offence. The substance of the matter is, not only fear of what the accused man may do, but also a complaint of something he has already done, some words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against the man if two things exist: first, a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach; secondly, a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do. Hence there must be something actually done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made.

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[12] 7 C.B.N.S. 191; 29 L.J.C.P. 170.

In these circumstances it seems to me that the proceedings are analogous to a criminal proceeding and that no action lies for maliciously instituting them unless they ended favourably for the plaintiff. In this case they ended unfavourably for the plaintiff. An order was made against him. This action, therefore, does not lie. I agree that the appeal should be dismissed.

ROMER L.J. For myself, I think it is a pity that this point was not set down as a preliminary point of law before the hearing. The action was a substantial one; I understand it was estimated to last three days, and I can well believe that it would. The point of law if decided, as it has been, against the plaintiff, would have been decisive of the case. Although there may have been good reason for not applying, I should have thought this was the very class of case in which an application ought to have been made under Ord. 25, r. 2, to have the point determined before the hearing, so as to save all discovery of documents, the collecting together of witnesses, and so on, and have the question decided at a very early stage. I think where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings. What I have said so far has nothing to do with whether the appeal succeeds or fails, but, in my judgment, it fails and should be dismissed.

Appeal dismissed.

Solicitors: *Gale & Phelps; Solicitor, Metropolitan Police.*

A. W. G.

BEAUCHAMP *v.* TURRELL.

1952
Feb. 27.

Sellers J.

Shipping—Limitation of liability—Fatal accident to member of crew—Negligence—Safe system of work—"Actual fault or privity"—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

The mere fact that a shipowner is liable in law for the failure of his servants to exercise reasonable care, or for his own breach of the duty, personal to him, to provide his servants with a safe system of work, does not, in the absence of evidence to the contrary, make him guilty of "actual fault or privity" so as to deprive him of his right to limit the amount of his liability in accordance with section 503 of the Merchant Shipping Act, 1894.

The Truculent [1952] P. 1 followed.

ACTION.

The plaintiff's husband, Robert Frederick Beauchamp, was employed by the defendant shipowner as a member of the crew of the Lowestoft steam drifter *Covent Garden.* One of the defendant's servants on board carelessly permitted a defective rope to be used for securing the mizzen sail. The plaintiff's husband, while standing on the canvas covering of a dinghy which was alongside in order to secure the mizzen sail, pulled on the rope, which broke and caused him to fall into the sea and drown.

The plaintiff brought an action against the defendant under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The action was tried by Sellers J. at Norwich Assizes in October, 1951.

At the outset counsel for the defendant sought leave to amend his defence so as to raise a plea relying on section 503 of the

Merchant Shipping Act, 1894.[1] The proposed amendment was not opposed, but it was agreed that the witnesses should be heard on the issue of the defendant's liability and that the amendment be made at a later stage in London.

Sellers J. found that the death of the plaintiff's husband was brought about by a breach of duty on the part of the defendant or on the part of his servants for whose acts he was vicariously liable. He held that the plaintiff had established liability on two grounds: (1) that a servant of the defendant had been negligent in permitting a defective rope to be used on board; and (2) that the skipper of the *Covent Garden* was directly responsible for the unsatisfactory method of securing the mizzen by standing on the cover of the dinghy.

The question whether the defendant could limit the amount of his liability for damages by section 503 of the Act of 1894 was argued in London. The case is reported only on this point.

J. F. Donaldson for the defendant. The defendant accepts that the rope was defective and that it was an unsatisfactory method for the plaintiff's husband to stand on the cover of the dinghy. A shipowner's liability is threefold: for the breach by a servant or agent of a duty owed by that servant or agent to the plaintiff; for the breach by a servant or agent of a duty owed to the plaintiff by the shipowner personally; and for the breach by himself of a duty owed personally by him to the plaintiff. It is submitted that there was no breach of any duty owed by the defendant to the plaintiff. If that submission is wrong, there was no breach by the defendant of such a duty although there may have been breach by a servant or agent. In either case the defendant shipowner is entitled to limit his liability in accordance with section 503 of the Merchant Shipping Act, 1894.

The defendant was not in breach of his duty to provide a safe system of work: the matters complained of by the plaintiff were essentially within the sphere of the master, who in discharging his duties was not discharging a duty which the defendant owed: *Hedley* v. *Pinkney & Sons Steamship Co. Ld.*[2] Similarly the defendant was not, in the absence of knowledge, liable for

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[1] Merchant Shipping Act, 1894, s. 503: "The owners of a ship, "British or foreign, shall not, where "all or any of the following occur-"rences take place without their "actual fault or privity; (that is to "say), (*a*) Where any loss of life or "personal injury is caused to any "person being carried in the ship; ". . . be liable to damages beyond "the following amounts . . ."

[2] [1894] A.C. 222.

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the use of the defective rope: *Couch* v. *Steel.*[3] In any event, whether the breach was of a personal duty or one owed by a servant, the shipowner is entitled to limit his liability unless he was personally blameworthy: *Paterson Steamships Ld.* v. *Robin Hood Mills Ld.*,[4] *per* Lord Roche; *Wilsons and Clyde Coal Co. Ld.* v. *English*,[5] *per* Lord Thankerton[6] and Lord Wright[7]; and *The Truculent.*[8] It is submitted that the defendant owed no personal duty, but that, if he did, the decisions in *The Truculent*[8] and *Paterson Steamships Ld.* v. *Robin Hood Mills Ld.*,[4] read in the light of *Wilsons and Clyde Coal Co. Ld.* v. *English*,[5] show that the defendant is nevertheless entitled to limit his liability.

G. A. Draycott for the plaintiff. The obligation to provide a reasonably safe system of work is a duty placed on the employer personally: *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan.*[9] If he delegates this duty to a servant he is still responsible for any breaches of duty which may be committed by the servant, who for that purpose stands in his employer's place: *Wilsons and Clyde Coal Co. Ld.* v. *English.*[5] The employer is so responsible on the footing that the law regards the servant's negligence as that of the employer. In *Standard Oil Company of New York* v. *Clan Line Steamers Ld.*[10] the question of the personal duty to provide a seaworthy ship was considered and the decision makes it clear that if this personal duty is left to a servant to perform the owner is still responsible for any breach.

Where the breach is of a duty personal to the employer, the latter cannot limit his liability under section 503 of the Act of 1894. *The Truculent*[8] is to be distinguished from this case as there the duty was a statutory one and the court was considering an owner's duty, not towards his employees, but to other persons using the high seas. The court was not there concerned with the very special duty of an owner to his employees, as was also the case in *The Warkworth.*[11]

Donaldson in reply. The defendant shipowner relies on the analysis of *Standard Oil Company of New York* v. *Clan Line Steamers Ld.*,[10] which Willmer J. made in *The Truculent*,[8] and adopts Willmer J.'s view that the *Standard Oil* case[10] was really a decision on whether there was actual fault on the part of the shipowner.

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[3] (1854) 23 L.J.Q.B. 121.

[4] (1937) 58 Ll.L.Rep. 33, 39, 40.

[5] [1938] A.C. 57.

[6] Ibid. 64.

[7] Ibid. 81.

[8] [1952] P. 1.

[9] [1934] A.C. 1.

[10] [1924] A.C. 100.

[11] (1884) 9 P.D. 145.

SELLERS J. [after stating the facts substantially as set out above]:—It was said that, apart from his vicarious liability for the acts of his servants, the defendant was in breach of his well-known common law duties, or one of them, in that at the time of this accident a proper system of work was not being used. It was said that the method of standing on the dinghy and doing the work from there was an improper system of work and was a breach of duty which the defendant owed the deceased man, a type of duty which was personal to the defendant. It was argued that that was a duty which the defendant could not escape, even if he could establish that he had taken all reasonable care to delegate to an appropriate and qualified person the task of doing it; and that if, in fact, it was not carried out in so far as reasonable care could have achieved it, the employer was responsible.

It was that aspect of the case which called for consideration when the defendant amended the defence so as to rely on the limitation provisions. Section 503 of the Merchant Shipping Act, 1894, which is applicable, provides: "The owners of a ship, "British or foreign, shall not, where all or any of the following "occurrences take place without their actual fault or privity; "(that is to say), (*a*) Where any loss of life or personal injury is "caused to any person being carried in the ship; . . . be liable "to damages beyond the following amounts . . ."

It appeared from what was said at the assizes at Norwich that the question which has arisen in this case was then called into consideration for the first time. That question is whether the defendant's liability is of that type which is not simply a vicarious liability for his servant, but is a breach of a duty which is personal to the employer either because it is a statutory duty such as arose in *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan*,[12] or a breach of the duties which arise at common law under the decision of the House of Lords in *Wilsons and Clyde Coal Co. Ld.* v. *English*,[13] and whether, if it were established that it was a breach of one of those duties, that established "actual fault or "privity" of the shipowner, or the employer, so as to deprive him of the benefit of limitation provisions of the Act of 1894.

At about the time when this case was being heard at the Norwich Assizes, the point was raised in express form before Willmer J. in the Admiralty Court in *The Truculent*,[14] and I have the advantage of his careful consideration in this matter. In my opinion, he came to a correct conclusion, which I propose to follow, and I think that that answers this case in favour of the defendant's claim to limit.

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[12] [1934] A.C. 1.

[13] [1938] A.C. 57.

[14] [1952] P. 1.

In *The Truculent*,[14] which concerned one of His Majesty's ships, it was contended that there was a breach of statutory duty with regard to lights on the part of the Admiralty. The submission was that that breach of statutory duty was quite sufficient to defeat the claim which was made to limit, and Willmer J. treated it in this way [15]: "I was invited to say that, just as in *Lochgelly* "*Iron and Coal Co. Ld.* v. *M'Mullan*,[16] the breach by colliery "owners of their statutory duty under the Coal Mines Act, 1911, "was held to amount to 'personal negligence or wilful act' on "their part for the purposes of the Workmen's Compensation "Acts, so also in this case the breach by the Admiralty of their "obligation to obey the collision regulations, so far as these "relate to the fitting of lights, should be held to amount to "'actual fault or privity.' In my judgment this argument fails "because the conclusion contended for does not follow from the "premise. Let it be assumed that in the matter of the provision "of lights section 419 of the Merchant Shipping Act, 1894, "imposes on shipowners an absolute obligation, responsibility for "the performance of which they cannot evade by delegation. Let "it further be assumed that by publishing the King's Regulations "and Admiralty instructions the Admiralty have accepted, on "behalf of His Majesty, a similar absolute obligation. It may "well be true that in an action for damage caused by defective "lights neither the owners of a merchant ship nor the Admiralty "could successfully evade liability on the footing that they had "delegated their duty to provide lights in accordance with the "regulations to some competent person. But this goes only to "liability, which is not in issue in the present case. The question "of limitation only arises after liability has been determined, and "it by no means follows that because liability cannot be evaded "the right of limitation is lost. If the proposition contended for "by the defendants were well founded, it would never be possible "for shipowners to limit their liability where loss or damage has "been caused or contributed to by defective lights, or other "defective equipment, in their ships. Yet many cases are to be "found in the law reports in which, in such circumstances, ship"owners have been able to satisfy the court of absence of fault "or privity on their part, and have been held entitled to limit

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[14] [1952] P. 1.

[15] Ibid. 17.

[16] [1934] A.C. 1.

" their liability. (See, for instance, *The Warkworth*,[17] a decision " of the Court of Appeal.) "

It is true that *The Truculent* [18] relates to the statutory duty, as does *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan*,[19] but there is no difference in principle between that case and a duty which is imposed absolutely in the sense that it falls on the employer, although it is only a duty to take reasonable care at common law. *In Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan* [19] itself, Lord MacMillan said [20]: " It appears to me quite immaterial whether " the duty to take care arises at common law, or is imposed by " statute "; and I apprehend that that is the view of the House, both in that case and in *Wilsons and Clyde Coal Co. Ld.* v. *English*.[21] Therefore, the application of Willmer J.'s decision applies to this case, and I follow it. I think that it is correct.

I was pressed by counsel for the plaintiff (who made all the submissions that could be made on behalf of his client, who suffered a grievous loss) with some observations of Lord Haldane in *Standard Oil Company of New York* v. *Clan Line Steamers Ld.*,[22] where it was said, in a passage which I think is more argument than precise finding and is based on supposition of event, that liability (in such circumstances as I have indicated here, and as arose there), or responsibility for the unseaworthy ship brought about by the master not being informed, was a personal obligation of the shipowners, so that there was actual fault or privity. However, that passage in Lord Haldane's speech stands alone and is not the basis of the decision.

Again, I would follow Willmer J. in treating that case as he did in *The Truculent* [23]: " I do not think, therefore, that it is " possible to contend that the mere proof of defective lights on " board the *Truculent* is sufficient of itself to prevent the " Admiralty, on behalf of His Majesty, from establishing absence " of fault or privity. I do not see that this conclusion is inconsistent with anything that was said in *Standard Oil Company* " *of New York* v. *Clan Line Steamers Ld.*,[22] to which I was " referred by the defendants. In that case, the facts of which " were very special, shipowners allowed their ship to put to sea " without informing the master of certain peculiarities of the ship " in relation to the filling of her tanks. The owners knew of these

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[17] 9 P.D. 145.
[18] [1952] P. 1.
[19] [1934] A.C. 1.
[20] Ibid. 18.
[21] [1938] A.C. 57.
[22] [1924] A.C. 100.
[23] [1952] P. 1, 18.

"peculiarities, but the master did not. The master's lack of "knowledge rendered the ship unseaworthy, and a loss occurred. "In these circumstances it was held that the owners were not "entitled to limit their liability, because they could not discharge "the burden of showing that the loss occurred without their "actual fault or privity. The fact that they had informed their "engineer superintendent of the ship's peculiarities did not help "the owners; they had not informed the master, and it was the "master's ignorance that was the cause of the ship's unseaworthiness. I do not read this decision as any authority for the "proposition that where shipowners delegate the performance of "a duty imposed on themselves they can in no case limit their "liability."

With that observation I respectfully agree. Another authority which seems to be in point does not appear to have been cited in *The Truculent*,[24] but Mr. Donaldson relied on it before me. True, it arises under different circumstances, but in *Wilsons and Clyde Coal Co. Ld.* v. *English* [25] Lord Wright gives this illustration [25]: "If I may take an analogy or instance of a similar personal "obligation, I note that the Carriage of Goods by Sea Act, 1924, "requires a shipowner to exercise due diligence or to take reason- "able care to provide a seaworthy ship. The shipowner is almost "certainly not an expert naval architect, engineer, or stevedore. "So far as I know it has never been claimed that this obligation "is fulfilled by the shipowner taking reasonable care to appoint "a competent expert; the shipowner is absolutely held to the "fulfilment of the obligation. It is the obligation which is "personal to him, and not the performance."

I was referred to the decision of the Privy Council in *Paterson Steamships Ld.* v. *Robin Hood Mills Ld.*,[26] where this aspect was considered in the opinion of the committee, which was given by Lord Roche, who pointed out that that was a claim for limitation and that liability had been established or admitted. He then considered the effect of the Merchant Shipping Act, and said [27]: "Before dealing with the specific points involved, the general "scope and effect of the section 503 of the Merchant Shipping "Act, 1894, may be briefly stated. Its scope and effect is not "to excuse or except a shipowner from liability for tort or breach "of contract, but to limit the amount for which he can be liable "for the faults of others than himself. The meaning of fault

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[24] [1952] P. 1.

[25] [1938] A.C. 57, 80.

[26] 58 Ll.L.Rep. 33.

[27] Ibid. 39.

"and privity in section 502 of the Act, which in that respect is "identical with section 503, has been authoritatively declared "by the Court of Appeal and the House of Lords in the case of "*Lennard's Carrying Co. Ld.* v. *Asiatic Petroleum Co. Ld.*[28]: "'The words "actual fault or privity" in my judgment infer "'something personal to the owner, something blameworthy in "'him, as distinguished from constructive fault or privity such "'as the fault or privity of his servants or agents (*per* Buckley "'L.J.). Actual fault negatives that liability which arises solely "'under the rule of respondeat superior (*per* Hamilton L.J.).' "So in the case of a company: 'It must be . . . the fault or "'privity of somebody who is not merely a servant or agent for "'whom the company is liable upon the footing respondeat "'superior, but somebody for whom the company is liable "'because his action is the very action of the company itself "'(*per* Lord Haldane L.C).'"

On those grounds, I do not find that the employer here, by the mere fact that he is liable in law for the failure of his servants to exercise reasonable care, or because of the breach of duty which is owed by him to his servants under the principles of *Wilsons and Clyde Coal Co. Ld.* v. *English*,[29] is thereby guilty of actual fault or privity so as to deprive him of his rights under the Merchant Shipping Act. On the facts which were adduced there has been no evidence which establishes that the defendant himself knew of anything defective, or failed in any care in appointing competent servants, and so forth. He delegated these matters to other people, and wherever the fault lay it was not his own personal failure; it was not with his knowledge, indeed. That was not contested before me as being a possible finding.

Under limitation that would be sufficient for the purposes of deciding this case in favour of the defendant, but it is, perhaps, possible to view this case in another way: that, although the obligation is on the employer to have a proper system of work with regard to a vessel at sea, that does require some careful application. It may well be the province of the shipowner to arrange that the ship should be properly provided with a crew and with adequate officers so that the watches can be properly fulfilled both on the bridge, on the deck and in the engine room, and if he so arranges the routine of the ship that the system is faulty and defective, that may indeed be brought home to him. That is a breach of his common law duty.

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[28] [1914] 1 K.B. 419; [1915] A.C. 705.

[29] [1938] A.C. 57.

I apprehend, however, that once a vessel is at sea, the master is in command and that in the course of a voyage a good many things may have to be done, and the master would be the person who would decree how they were to be done. During the course of the hearing I gave an illustration of that: if one of the ship's boats had broken loose and had to be put back and secured, and if the master ordered some men to do that in a way which was dangerous and someone was injured, it might be said that it was an unsafe system of work. That is something which would fall within the province of the master in charge of the ship, and would not be a matter for which the shipowner on land and out of control of that situation would be held responsible as a breach of his personal duty to his servants. He is, of course, now vicariously liable for the negligent acts of his servant towards a fellow servant.

That only goes to apply the principle which has been applied by the House of Lords in another case, as between the employer and his servant directly: that in the course of the work there may be tasks which properly fall within the sphere of the workman's activities, so that he will decide (and may decide) how the work shall be done; and if he decides to have it done in a way which is defective and dangerous, the responsibility is his. Of course, there are other and major matters which fall within the sphere of the employer, and it is those matters of systems of work, provision of plant, and provision of competent people, which create the duty in the employer.

I need not develop that here. I only indicate that the particular act in this case of doing this work on the top of the canvas cover of a dinghy was selected by the skipper of the vessel. He was responsible for it, and on those facts, I do not find that there was any actual fault or privity of the defendant shipowner. I therefore find that the defendant is entitled to limit his liability in accordance with section 503 of the Merchant Shipping Act.

The extent of that limitation has been the subject of agreement. The Act provides, in the case of loss of life, that the rate is £15 a ton, and worked out in accordance with the tonnage, that limits the liability to a total of £975, which is the maximum liability of the defendant in the circumstances of this case.

[His Lordship considered the extent of the plaintiff's loss and said that, but for the limitation, he would have awarded the plaintiff a total sum of £3,000 under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934.]

Judgment for the plaintiff.

Solicitors: *W. F. Gillham; Holman, Fenwick & Willan.*

S. C.

C. A.

1952 *Jan.* 28, 29, 31; *Feb.* 29.

Somervell, Denning and Romer L.JJ.

ARAB BANK LD. *v.* ROSS.

[1949 A. No. 425.]

Bill of Exchange—Promissory note—Bank claiming as holders in due course—Note dishonoured—Indorsement of note deviating from mandate on its face—Omission of word "company"—Note not "complete and regular on its face"—Pleading—Irregularity not pleaded in defence—Defendant restricted to defences pleaded—R.S.C., Ord. 21, *r.* 2*—Bills of Exchange Act,* 1882 (45 *&* 46 *Vict. c.* 61), *s.* 29.

The plaintiff bank, having discounted for value two promissory notes given by the defendant, pursuant to an agreement for the sale and purchase of shares, sued the defendant as holders of the notes in due course. The notes had been made out in the name of "Fathi and Faysal Nabulsy Company" as payees, but had been indorsed by one of the partners in that firm, "Fathi and Faysal Nabulsy," the word "company" being omitted:—

Held, that although the indorsement was valid to pass the title in the notes to the bank, the omission of the word "company" was sufficient to give rise to reasonable doubt whether the payees and the indorsers were necessarily the same. Therefore the notes were not complete and regular on the face of them and the bank could not succeed as holders in due course within section 29 of the Bills of Exchange Act, 1882.

Slingsby v. *District Bank* [1932] 1 K.B. 544 followed.

Held, further, that the bank, having pleaded that they were holders in due course, were entitled, on the principle that the greater included the less, to rely on the more limited claim that they were holders for value, although they had not expressly pleaded it; and that the defendant, having failed to establish any defect in the title of any previous party, was liable on the notes.

Appeal from McNair J.

The plaintiffs, the Arab Bank Ld., of Jerusalem, claimed that they were the holders in due course of two promissory notes dated

July 12, 1946, made by the defendant Ross, each for £10,000 and payable on demand on July 1, 1947, and December 31, 1947. The payees were "Fathi and Faysal Nabulsy Company," a firm registered in Palestine, of which Fathi and Faysal Nabulsy were the two partners. The notes were alleged to have been given in pursuance of an agreement between Ross and the payee firm as part of the purchase price for shares in the Lostock Hall Spinning Co. Ld. By the statement of claim it was alleged that the notes had been duly indorsed by the Nabulsys to the order of the plaintiffs.

By his defence the defendant alleged that he had been induced to make or deliver the notes by the fraud of the payees, in that the shares were at that time charged to the Arab National Bank Ld., who held the certificates and blank transfers to secure the payees' overdraft of £25,000, and the payees knew that they were not in a position to sell or transfer the shares; that in order to secure the certificates the defendant had had to pay £20,000 to the Arab National Bank Ld.; that the plaintiffs were not holders in due course of the notes but merely agents for collection on behalf of the payees; that the plaintiffs had knowledge of the fraud on the part of the Nabulsys and therefore had not taken the notes in good faith; and further, that as the Nabulsys were directors of the plaintiff bank the plaintiffs were affected with notice of the fraud.

McNair J. held that it had not been proved that the share certificates were deposited with the National Bank at or before the date of the agreement; that even if they had been this was not inconsistent with ability to pass a good title; that there was nothing in the evidence to show that the issue of the notes was affected with fraud, duress or illegality within the meaning of section 30 (2) of the Bills of Exchange Act, 1882; that the plaintiff bank had discounted the notes for value and it was not established that they had acted otherwise than in good faith and without any notice of any defect in the bills; and that the plaintiffs were not affected by any knowledge possessed by the Nabulsys, by reason of the fact that they or their firm were directors of the bank.

During the hearing before the judge counsel for the defendant sought to raise a further point, which had not been pleaded in the defence, viz., that the notes when taken by the plaintiffs were not complete and regular on their face, because whilst the notes were payable to "Fathi and Faysal Nabulsy Company," the indorsement was "Fathi and Faysal Nabulsy," the word "company" being omitted; and therefore the plaintiffs could not succeed as holders in due course by reason of section 29 (1) of the Bills of Exchange Act, 1882.

The judge, while ruling that this point should have been pleaded, and refusing leave to amend the defence, nevertheless allowed it to be argued as a point of law. He held, however, that the signature of the names of the two partners by the hand of the one partner Faysal was the known and recognized signature of the partnership and would leave nobody in any reasonable doubt that the named payee intended to pass property in the notes to the bank. In his opinion the notes were complete and regular on their face.

The judge therefore gave judgment for the plaintiffs, and the defendant appealed.

H. I. Nelson K.C. and *Fenton Atkinson* for the defendant.

Gerald Gardiner K.C., *F. A. Stockdale* and *J. Nasir* for the plaintiffs.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

February 29. The following judgments were read:—

SOMERVELL L.J., after stating the facts, referring to the allegations pleaded in the defence and the findings thereon of the trial judge [summarized above], said those findings, with which he agreed, disposed of the defences set out in the pleadings. He continued: The point with which we are concerned was not pleaded. It was produced by Mr. Nelson on the second day of the hearing, and it was this: The indorsement, which was in Arabic and English, was "Fathi and Faysal Nabulsy," the final word "company" being omitted. It was submitted that the notes, when taken by the plaintiffs, were consequently not complete and regular on their face and therefore the plaintiffs were not holders in due course. The learned judge originally ruled that this point should have been pleaded and he refused leave to amend. He later held that it could be argued as a point of law. I will come back to these rulings later. The reference is to section 29 of the Bills of Exchange Act.[1] Other relevant sections of the Act are section 30 and section 38 (1), (2) and (3).

The indorsements, according to the evidence as accepted by the judge, were written by Mr. Faysal Nabulsy, who had authority to sign for the firm, at the Jerusalem branch of the plaintiffs, in the presence of its manager. This followed on an interview at which the plaintiffs, having made inquiries as to the defendant's financial standing, agreed to discount the notes. Different inks and pens appear to have been used in the Arabic and English signatures, and the defendant submitted them to the expert Mr. Gurrin. It was at one time suspected by the defendant that the indorsements had been altered after unconditional payment of the bill first due had been refused. It was, however, clear that no such alteration could have taken place. I agree with the judge that the different inks and pens add nothing to the case. The judge, having allowed the point to be argued, found that the bills were complete and regular on their face notwithstanding the discrepancy. I will set out his conclusion before considering the authorities. "None of the cases to which "I was referred dealt in terms with the question whether a "deviation in the form of the indorsement from the exact "description of the payee in the bill prevented the bill from "being complete and regular on the face of it; but, holding, as "I do, that the signature of the names of the two partners, "Fathi and Faysal Nabulsy, by the hand of the one partner "Faysal, was the known and recognized signature of the partner-"ship and would leave nobody in any reasonable doubt that the "named payee intended to pass property in the bill to the bank, "and there being no evidence that Fathi and Faysal Nabulsy "Company constituted a legal entity distinct from the two "natural persons Fathi and Faysal Nabulsy, I find nothing in "the decided cases which compels me to hold that an indorse-"ment in this form involves that the bills were not complete and "regular on their face. Accordingly, I hold that the defendant "fails on this issue."

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[1] Bills of Exchange Act, 1882, s. 29: "(1) A holder in due course "is a holder who has taken a bill, "complete and regular on the face of "it, under the following conditions; "namely, (*a*) That he became the "holder of it before it was overdue, "and without notice that it had been "previously dishonoured, if such was "the fact: (*b*) That he took the bill "in good faith and for value, and that "at the time the bill was negotiated "to him he had no notice of any defect "in the title of the person who nego-"tiated it."

Mr. Nelson relied on the decision of this court in *Slingsby* v. *District Bank*,[2] affirming and approving a judgment of Wright J. In that case the plaintiff had made out a cheque to John Prust & Co., a firm of London stockbrokers. The partner in the firm of solicitors who acted for them, Messrs. Cumberbirch & Potts, fraudulently inserted after the name of the payee the words "per Cumberbirch and Potts." He then indorsed the cheque "Cumberbirch and Potts" and paid it dishonestly into the account at the Westminster Bank of a company in which he was interested. The cheque was presented to and paid by the defendant bank, who claimed to debit the plaintiff's account. The plaintiff brought the action claiming to be relieved from the debit. Various points were raised. The defendant bank sought to invoke, inter alia, the protection of section 64. This protection was only available if the Westminster Bank was a holder in due course. Wright J. held that if his view of the incorrectness of the indorsement was right the cheque was not complete and regular on its face.

There was evidence that in a certain class of case a practice had arisen of drawing cheques "Pay A B per X." This was done in cases where dividends are collected by a bank for its customer. Evidence was called that such cheques were indorsed not A B per X but simply X. The witnesses were confronted with publications, admittedly organs of the profession, which stated that the proper indorsement was A B per X. This latter was the conclusion of Wright J. and of this court. The representative capacity of X, which appears on the face of the bill, must appear in the indorsement. If X alone appears he is purporting to indorse as principal, which is "a departure from the "terms of the mandate appearing on the face of the cheque." In this court, Scrutton L.J. held that the cheque was not properly indorsed; that the indorsement should have been "John Prust "and Co. per pro Cumberbirch and Potts." Greer L.J. held that the indorsement was "ineffective, and that the defendants "cannot rely upon the payment made to an indorsee who is some "person other than the payee."

A number of cases were referred to. In some of them the question was whether partners were liable on bills or notes which were made in a name which varied to some extent from the true name of the firm. Such a point was taken in *Forbes* v. *Marshall*.[3] Pollock C.B. held that the name used was substantially the name of the firm and that was sufficient.[4] The other members of the court agreed. Martin B. said it was sufficient if "the name "used, though inaccurately, yet substantially described the "firm." It is interesting, as the trial judge pointed out, that in that case Martin B. expressed a doubt as to an earlier decision, *Kirk* v. *Blurton.*[5] *Kirk* v. *Blurton* was in its area the converse of the present case. The name of the firm was John Blurton. The bill was signed and indorsed John Blurton & Co. The court held the partners not bound. Martin B., in *Forbes* v. *Marshall*,[4a] said: "I think that John Blurton & Co. meant the firm of John "Blurton." These cases are, of course, in a different area, but they show that in that area the courts have adopted the test as stated by Martin B. Precise correspondence is not required.

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[2] [1931] 2 K.B. 589; [1932] 1 K.B. 544.

[3] (1855) 11 Ex. 166.

I will refer briefly to some of the cases dealing with indorsements. In *Leonard* v. *Wilson*[6] a cheque payable to Terney and Farley was indorsed Terney and Farelly. The facts were complicated, but Lord Lyndhurst held that the indorsement, which though misspelt was authorized, passed the property in the bill. The indorsee might have maintained an action. It is worth noting that a custom of London bankers to refuse bills where there is a letter wrong in an indorsement was admitted. I agree with the judge who, referring to this case, held that the indorsement of the notes here was valid and passed the property. In *Hadley & Co.* v. *Henry*[7] a bill made payable to the Union Bank of Australia was indorsed by a sub-manager in the name of the Union Bank of Australia Ld. It was argued this was not an indorsement. Hood J. held that it was. It was plain that the drawer intended the bill to be payable to the Union Bank of Australia Ld. On the other hand, in *Bank of Montreal* v. *Exhibit and Trading Co. Ld.*,[8] a promissory note was made by the defendants payable to The Goderich Organ Company. That was the name of a firm with which, it appears, the defendants had done business. When it reached the payees the business of the firm had been transferred to a limited company, The Goderich Organ Company Ld. An official of the limited company added the word "Limited" on the face of the note and indorsed it in the limited company's name to the plaintiffs, who claimed as holders in due course. Under section 64 of the Act of 1882 the note was payable according to its original tenor, and it was argued that the limited company was the same as the firm. This was, of course, wrong. Phillimore J. held that as there were two legal entities involved a bill payable to one could not be validly indorsed by the other. The distinction between the two cases is clear. In the first there was only one legal entity in fact, named on the face by words which identified it to anyone. An indorsement in its full and proper name though different was valid. In the second there were two legal entities, the note being intended for the one which had not indorsed it.

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[4] 11 Ex. 166, 176.
[4a] Ibid. 180.
[5] (1841) 9 M. & W. 284.
[6] (1834) 2 Cr. & M. 589.
[7] (1896) 22 V.L.R. 230.
[8] (1906) 11 Com.Cas. 250.

Evidence was tendered in the present case, and led for the defendant de bene esse, by bankers who said that it was against the practice of bankers to accept indorsements unless there was an exact correspondence. The practice of bankers is or may be relevant when a court has to consider whether a bank has been negligent or acted in the ordinary course of business under sections 60, 79, 80 or 82 of the Act of 1882. It is also no doubt relevant in considering the relation of banker and customer. That relation will ordinarily be subject to universal practice. It does not, however, I think solve the present problem any more than it does the question whether an indorsement is valid to pass the property: *Leonard* v. *Wilson.*[9]

I have referred to these cases, as they were discussed before us, but I agree with the judge that none of them is conclusive on the point raised in the present case. The point, as sought to be taken here by the defendant, has a certain unreality. In Chalmers' Bills of Exchange (11th ed.) the learned editor, in considering the words "complete and regular on the face of it," expresses their intention in this sentence, at p. 93: "If the bill "itself conveys a warning, caveat emptor." Here the notes were indorsed by a person authorized to indorse for the payee in the presence of the "emptor," and, as the judge found, the signature as indorsed was known to the defendant as the ordinary and recognized signature of the partnership. Is this, as the judge thought, relevant? I have with reluctance come to the conclusion that it is not, and that one must consider whether, disregarding the circumstances as set out above, the bill as a document is regular on the face of it. Considered from this angle, is the discrepancy one which on the face of it is an inadvertent discrepancy—"John Williams" as payee indorsing "J. Williams"? Though this would entitle a bank or anyone else to refuse to buy or discount a bill, it would not, in my opinion, make it irregular on its face.

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[9] 2 Cr. & M. 589.

I was inclined at first to think that the omission of the word "company" was such a discrepancy. I have had the advantage of reading the judgment about to be delivered by my brother Romer. I need not repeat, but I agree with what he says as to the legal significance of the word "company." The judge clearly considered this point as he relied on the fact that there was no evidence that Fathi and Faysal Nabulsy Company constituted a legal entity distinct from the two natural persons, Fathi and Faysal Nabulsy. The absence of such evidence would clearly be relevant to the question whether it was a valid indorsement to pass the property, but I think completeness and regularity must be determined by looking only at the bill, with a realization that there might be evidence that there were two legal entities, one "A and B" and the other "A and B Company." I have, therefore, with some hesitation, come to the conclusion that these notes were not regular and complete on their face by reason of the omission of the word "company." I do not, for reasons which will appear, think that this entitles the defendant to succeed, but as the judge dealt with the point I thought it right to express my conclusion upon it.

Mr. Nelson took a further point and submitted that the signature should have been "for Fathi and Faysal Nabulsy "Company," and signed by one of the partners. No authority was cited for this proposition, and it seems to me inconsistent with the indorsement which Scrutton L.J. said should have been on the bills in the *Slingsby* case.[10] The judge found that the defendant had himself seen the note when it was presented and had, by not taking, waived the irregularity which was apparent on the face of the note. I feel some difficulty about this. The defendant's attitude was that he would pay this and the later note against the share certificates. I am doubtful if by doing this he was waiving other defences if the share certificates were not forthcoming. The judge said that the defect could have clearly been remedied. It could, I think, clearly have been remedied with regard to the second bill. Mr. Nelson submitted that on technical grounds which I need not elaborate, it could not have been remedied so far as the first bill was concerned. I must not be taken as accepting that, but the point does not arise if the foundation for waiver is lacking.

I now come to the question whether the judge should have allowed the point to be raised or whether, in any event, it entitles the defendant to succeed. The judge decided that the point was available to the defendant and could be taken on the basis that it was a bare point of law arising from facts apparent on the notes. In the first place I am clear that this point should have been pleaded. A holder of a bill is prima facie presumed to be a holder in due course (section 30). R.S.C., Ord. 21, r. 2, says: "In actions upon bills, promissory notes or cheques, a defence "in denial must deny some matter of fact," and examples are given which include "indorsing." The predecessor of this rule can be found set out in Bullen & Leake, Precedents of Pleadings (3rd ed.), at p. 520: "In all actions upon bills of exchange and "promissory notes, the plea of 'non assumpsit' and 'never "'indebted' shall be inadmissible. In such actions, therefore, "a plea in denial must traverse some matter of fact," and examples are given as they appear in R.S.C., Ord. 21, r. 2. The fact relied on here is the absence of the word "company" in the indorsement and its presence on the face of the bill. It seems to me quite plain that if this had been the only point in answer to the plaintiffs' claim as holders in due course it must have appeared in the defence. But it does not in itself establish the non-liability of the defendant. It means the plaintiffs' claim may be defeated by defects of title of prior parties or personal defences available to prior parties among themselves.

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[10] [1932] 1 K.B. 544.

The principle to be gathered from the rule and its predecessor is that a defendant sued on a bill must allege the facts on which he relies in disputing his liability on the bill or note. In the old days, as the cases show, bills passed through many hands. Fraud or defects in title or personal defences affecting prior parties might be relevant to liability or shift the onus. It was for the defendant to make out a defence. In *Agra and Masterman's Bank Ld.* v. *Leighton* [11] Bramwell B. said: "The intention of the Bills of Exchange Act was, that where there was "no pretence for a defence, the party sued should not be allowed "to defend, and the holder should have judgment as of course; "but that if the defendant had a real, I do not say good, defence, "he should have leave to appear and set it up." That was under the summary procedure under the Bills of Exchange Act, 1855, which applied, in substance, to actions on bills of exchange and promissory notes, the existing Ord. XIV procedure.

On a claim on a bill of exchange or promissory note the defendant cannot simply put the plaintiff to the proof. The judge, on reconsideration, allowed the defendant to challenge the indorsement so long as he did not rely on any specific facts other than those appearing on the bills, and I would myself have been inclined to add—probably the judge intended this—facts already to be found in the defence, if proved. If it had been established that the indorsement was invalid to pass the property that would have been one thing. I agree with the judge, as I have said, that it was plainly valid to pass the property. The plaintiff is a holder who, on the facts as found, gave value in good faith. Mr. Gardiner, when he had had time to consider the matter, submitted to the judge that the plaintiffs could succeed as holders. The judge disallowed this submission on the ground that the plaintiffs had claimed as holders in due course and could not claim in the alternative as holders. It was, as I understand it, agreed before us that on the judge's judgment a further claim could be brought in other proceedings on the basis that the plaintiffs were holders. I do not think, with respect, that this is right. Assume that the only case which the defendant here desired to put forward was that the plaintiff, though a holder for value in good faith, had discounted a bill incomplete on its face and took it therefore subject to a defect in title of a prior party, he would have had to allege not only the incompleteness but the facts establishing the defects of title. I do not agree that he could have pleaded the incompleteness and defeated the plaintiff's claim unless the plaintiff amended by claiming in the alternative as a holder. The object of the proceedings is to determine whether the defendant is liable on the bill. He may be, although the plaintiff is a holder, but not in due course.

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[11] (1866) L.R. 2 Ex. 56.

This shows that the point is a bare point of law only if quoad defects of title the defendant is restricted to the allegations in his defence. If he had succeeded in establishing that the notes had been obtained by fraud, but failed to establish the plaintiff's knowledge, it may be that he could have succeeded once he had shown that by reason of the incompleteness of the note the plaintiff was not a holder in due course. But he failed to establish the only fraud or defect in title he alleged. I have, therefore, come to the conclusion, first, that the point did require an amendment, and on this basis the judge was not prepared to allow it. With that decision I agree. Secondly, it fails to avail the defendant on the only basis on which he was allowed to argue it, namely, as a bare point of law. In these circumstances the only points open to the defendant are those raised in his defence, and on these he failed. In differing from the judge on this aspect of the case, I would like to say that the case as raised in the defence and as fought was a difficult and complicated one. Into this field was inserted the present intricate and to me difficult point, difficult in itself and difficult in its relation to pleading. It is one of those cases in which the court which hears a second argument, when the plaintiff's counsel has had time to consider the implications, has a great advantage from which I, at any rate, tried to benefit.

In my opinion the appeal should be dismissed.

DENNING L.J. The first question in this case is whether the Arab Bank Ld. were holders in due course of the promissory note, and that depends on whether, at the time they took it, it was "complete and regular on the face of it" within section 29 of the Bills of Exchange Act, 1882. Strangely enough, no one doubts that the "face" of a bill includes the back of it. I say strangely enough, because people so often insist on the literal interpretation of Acts of Parliament, whereas here everyone agrees that the literal interpretation must be ignored because the meaning is obvious. The meaning is that, looking at the bill, front and back, without the aid of outside evidence, it must be complete and regular in itself.

Regularity is a different thing from validity. The Act itself makes a careful distinction between them. On the one hand an indorsement which is quite invalid may be regular on the face of it. Thus the indorsement may be forged or unauthorized and, therefore, invalid under section 24 of the Act, but nevertheless there may be nothing about it to give rise to any suspicion. The bill is then quite regular on the face of it. Conversely, an indorsement which is quite irregular may nevertheless be valid. Thus, by a misnomer, a payee may be described on the face of the bill by the wrong name, nevertheless, if it is quite plain that the drawer intended him as payee, then an indorsement on the back by the payee in his own true name is valid and sufficient to pass the property in the bill (*Leonard* v. *Wilson*[12]; *Bird & Co.* v. *Thomas Cook & Son Ld.*[13]; *Hadley* v. *Henry*[14]), but the difference between front and back makes the indorsement irregular unless the payee adds also the misnomer by which he was described on the front of the bill. This is what he eventually did in *Leonard* v. *Wilson.*[12]

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[12] 2 Cr. & M. 589.

[13] [1937] 2 All E.R. 227.

[14] 22 V.L.R. 230.

Regularity is also different from liability. The Act makes a distinction between these two also. On the one hand a person who makes an irregular indorsement is liable thereon despite the irregularity. Thus, if a payee, who is wrongly described on the front of the bill, indorses it in his own true name, the indorsement is irregular, but he is liable to any subsequent holder and cannot set up the irregularity as a defence; or, if he is rightly described on the front of the bill, but indorses it in an assumed name, the indorsement is irregular but he is liable thereon as if he had indorsed it in his own name: see section 23 (1) and section 55 (2) of the Act. Conversely, a regular indorsement will not impose liability if it is forged or unauthorized. Thus, where a firm is the payee, but is described in an unauthorized name which is substantially different from its real name, an indorsement by one partner in that name does not impose liability on the other partners: *Kirk* v. *Blurton.*[15] It would be otherwise if the name was substantially the same: *Forbes* v. *Marshall.*[16]

Once regularity is seen to differ both from validity and from liability, the question is when is an indorsement irregular? The answer is, I think, that it is irregular whenever it is such as to give rise to doubt whether it is the indorsement of the named payee. A bill of exchange is like currency. It should be above suspicion. But if it is asked: When does an indorsement give rise to doubt? I would say that that is a practical question which is, as a rule, better answered by a banker than a lawyer. Bankers have to consider the regularity of indorsements every week, and every day of every week, and every hour of every day; whereas the judges sitting in this court have not had to consider it for these last 20 years. So far as I know the last occasion was in *Slingsby's* case.[17]

The Law Merchant is founded on the custom of merchants, and we shall not go far wrong if we follow the custom of bankers of the City of London on this point. They have given evidence that they would not accept the indorsements in this case as a regular indorsement. They said that if a bill is made payable to "Fathi and Faysal Nabulsy Company" they would not accept an indorsement "Fathi and Faysal Nabulsy." I think there is good sense in their view. For aught they know, in Palestine the word "company" may be of vital significance. It may there signify a different legal entity, just as the word "limited" does

[15] 9 M. & W. 284.

[16] 11 Ex. 166.

[17] [1932] 1 K.B. 544.

here (*Bank of Montreal* v. *Exhibit and Trading Co.*[18]), or it may signify a firm of many partners and not merely two of them. I agree with the bankers that this indorsement does give rise to doubt whether it is the indorsement of the named payee. It was, therefore, irregular.

It was suggested that this attitude of bankers was an excess of caution in their own interests. They insist on strict conformity, it was said, so as to be able to avail themselves of the protection of sections 60, 79, 80 and 82 of the Act of 1882, which they feared they might lose if they paid on an indorsement which did not correspond exactly with the name of the payee. But it is to be noticed that this usage of bankers goes back to times long before those sections were part of the law. The usage certainly existed in 1834 (see *Leonard* v. *Wilson*[19]), whereas section 60 did not appear, even in its original form, until 1853, and sections 79, 80 and 82 not till 1878. The truth is, I think, that the bankers adopted this strict attitude both in their own interests and also in the interests of their customers. It would be quite impossible for them to make inquiries to see that all the indorsements on a bill are in fact genuine; but they can at least see that they are regular on the face of them: see *Bank of England* v. *Vagliano*,[20] *per* Lord Macnaghten. That is some safeguard against dishonesty. It is a safeguard which the bankers have taken for the past 120 years at least, and I do not think we should throw any doubt today on the correctness of their practice.

I do not stay to discuss the regularity of indorsements by married women or titled folk, except to say that titles and descriptions can often be omitted without impairing the regularity of the indorsement. The word "company" in this case is not, however, mere description. It is part of the name itself. It was suggested that an indorsement in Arabic letters would be regular. I cannot accept this view. The indorsement should be in the same lettering as the name of the payee; for otherwise it could not be seen on the face of it to be regular. My conclusion is, therefore, that this promissory note, when it was taken by the Arab Bank Ld., was not complete and regular on the face of it. They were not, therefore, holders in due course.

The next question is: Was the irregularity waived? I think "No." When the first note was presented, the maker, Mr. Ross, said that he would honour the notes if he got the share certificates. That was not an unconditional waiver of any irregularities. It only meant that he was prepared to waive any irregularities if he got the share certificates. As he never got them, there was no waiver.

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[18] 11 Com.Cas. 250.

[19] 2 Cr. & M. 589.

[20] [1891] A.C. 107, 157.

Now I must come to the pleadings. The Arab Bank Ld. claimed that they were "holders in due course." They have failed to make good that claim because the indorsement was not regular on the face of it. But nevertheless it is, I think, open to them to claim as "holders." The difference between the rights of a "holder in due course" and those of a "holder" is that a holder in due course may get a better title than the person from whom he took, whereas a holder gets no better title. In this regard a person who takes a bill which is irregular on the face of it, is in the same position as a person who takes a bill which is overdue. He is a holder but not a holder in due course. He does not receive the bill on its own intrinsic credit. He takes it on the credit of the person who gives it to him: cf. *Brown* v. *Davies*,[21] *per* Buller J. He can sue in his own name, but he takes it subject to the defects of title of prior parties: see section 38 of the Act.

Under the rules of pleading, as I have always understood them, a pleader, who has pleaded more than he strictly need have done, can always disregard the unnecessary or surplus averments and rely simply on the more limited ones. Thus the plaintiffs here, who have alleged that they are "holders in due "course," can rely on the more limited allegation that they are "holders."; because the greater allegation of "holders in due "course" includes the lesser allegation of "holders." Mr. Nelson argued strongly to the contrary; but he was forced to admit that, if he were right, the result would be this: the plaintiffs would lose this action as "holders in due course," but could then immediately bring another action as "holders" and fight the battle over again. I would be sorry if the rules of pleading led to such a result; but I do not think they do. Upon these pleadings I think the plaintiffs were clearly entitled to rely on the fact that they were "holders," and the defendants have to meet a claim on that footing.

I see no injustice to Mr. Ross in this. When he was faced with the claim as "holders in due course," neither he nor his advisers noticed that there was any irregularity on the face of the note. He would, therefore, as a matter of course, plead any defects of title which he thought he could prove; for by so doing he would put the burden of proof on to the Arab Bank Ld. When faced with a claim as "holders," he would plead the selfsame defects, not merely to alter the burden of proof, but to defeat the claim altogether. In either case he would plead all the defects which he thought he could prove. He did in fact plead one defect of title in the Nabulsy brothers. He pleaded that they obtained the notes by fraud. He failed to prove that plea. He now seeks to allege another defect. He says that they negotiated the notes in fraud of him, knowing they could not hand over the share certificates. That allegation was neither pleaded nor proved. If it was to be relied upon, it certainly should have been pleaded. Not having been pleaded, it cannot now be raised. It has been repeatedly said in this court that fraud must be distinctly alleged and as distinctly proved. The result is that no defect has been shown to exist in the title of the Nabulsy brothers. There is no answer to the plaintiffs' claim as holders, and the appeal must be dismissed.

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[21] (1789) 3 T.R. 80, 82.

ROMER L.J. The main point which was argued before us on behalf of the defendant—and in my opinion the only point of substance on the appeal—was that the promissory notes sued on were not "complete and regular on the face" of them when the bank discounted them, by reason of the fact that there was a want of conformity between the name of the payees ("Fathi and "Faysal Nabulsy Co.") on the one hand and the name by which the payees indorsed the notes ("Fathi and Faysal Nabulsy") on the other. If this point should be established it would follow, in view of section 29 (1) of the Bills of Exchange Act, 1882, that there would be a fatal impediment to the plaintiffs' claim to sue on the notes as holders in due course; and, on the face of the pleadings, the plaintiffs were not suing on the notes under any different or other title.

The first question for consideration would seem to be whether it was open to the defendant on the pleadings to take the point in the court below and whether it was open to him to take it before us. By their specially indorsed writ (issued on February 10, 1949) the plaintiffs claimed against the defendant as maker of the notes in question "payable on demand on July 1, 1947, "and December 31, 1947, respectively to Fathi and Faysal "Nabulsy Company or order which notes were duly indorsed to "the order of the plaintiffs who have also indorsed them and "are held by the plaintiffs as holders in due course." The only allegations in the defence which are in any way relevant to the point now under consideration are to be found in paragraph 1, in which the defendant (subject to irrelevant exceptions) put in a general traverse of every allegation in the statement of claim, and in paragraph 5, in which he denied that the plaintiffs were holders in due course of the notes and set up the affirmative plea that the plaintiffs were and had at all material times been agents for collection only on behalf of the payees of the said notes. For the rest, the defendant's substantial defence was founded on the alleged fraud of the payees at the time the notes were issued, of which it was said that the plaintiffs were affected with notice. No reply was delivered.

Such were the pleadings that were before the judge, and in my opinion it is reasonably clear that it was not open to the defendant, without amendment, to attack his adversary with what now transpires to be his principal weapon. In the first place the necessary inference from the fact that the defendant on his defence was challenging the plaintiffs' claim to be holders in due course on certain specified grounds, was that he was not seeking to challenge it on any other grounds. Secondly, the "want of "conformity" argument, although primarily a point of law, arises from a fact, viz., the fact that there was a difference between the description of the payees and the description of the indorsers; and this was a fact which the defendant should have pleaded if he intended to rely on it (R.S.C., Ord. 21, r. 2). The point did not apparently emerge until the second day of the evidence, during Mr. Nelson's cross-examination of Mr. A. M. Shoman concerning the Nabulsy brothers' directorship of the plaintiff company. In the discussion that then took place Mr. Nelson made it quite clear that he was relying on the point as a pure point of law, and he put it in the following way: "If a bill "is payable to 'X Company' a signature on the back 'X' is "not complete and regular on the face of it." The judge took the view that the point ought to have been pleaded and Mr. Nelson accordingly asked for leave to amend. The judge refused leave but left it open to Mr. Nelson to argue any point which was open to him as a matter of law. The question was referred to again later, and the judge said: "It seems to me, on reflection, "that it is open to the defendant to challenge the due indorse-"ment which is alleged in the statement of claim, and that "seems to me to be a matter which the plaintiffs have to prove "subject to any presumptions which may arise under the Act; "and that accordingly the defendant is free to challenge that so

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"long as he does not, in his challenge, rely on any specific facts "other than the facts appearing on the bills. It is my intention "that it should be open to the defendant to challenge that "indorsement on the ground of divergence which appears on the "face of the bill itself between the nature of the payee and the "indorser, but it should not be open to him to allege that the "name of the payee is a legal entity in Palestine law, separate "from the partnership firm."

That ruling was acceptable to Mr. Nelson. Mr. Gardiner then said that he apprehended it would be open to him to raise any question which he could have pleaded if Mr. Nelson's point had been pleaded, and he instanced the question of what law applied to the indorsement, and the question of waiver, and the judge said that he would consider the question of waiver in due course. As I have said, the only allegation that the defendant need have pleaded as a foundation for his legal point was that the payees were described on the bills as "Fathi and Faysal "Nabulsy Company," whereas the indorsements were in the name of "Fathi and Faysal Nabulsy." This was a very short and simple allegation of fact, and inasmuch as it was a fact which appeared on the bills themselves it was one which, in view of the ruling of the judge which I have quoted, he intended to allow the defendant to rely on. It accordingly appears to me that from that point onwards the defence was treated as amended, although it was not (as it ought to have been) amended in actual fact.

Had this strict course been followed the plaintiffs probably would have applied for (and would have certainly been granted) leave to put in a reply raising the question of waiver, instead of introducing that plea by amendment into their statement of claim after judgment. And they could, in any event, although they did not do so, have applied for leave to amend their statement of claim by taking up their position, alternative to that of holders in due course, as holders for value. The practice of treating a pleading as amended, without actually amending it, frequently leads to trouble and has done so in the present case. It is not, however, an altogether unusual course to adopt, particularly where the proposed amendment is short and simple. Having regard to the discussion as a whole, and particularly to what the judge said, and in view of the fact that Mr. Nelson's point of law was subsequently argued by both sides and dealt with in the judgment, I think myself that the proper view to take is that the defence must be treated as having been amended to the extent that an amendment was necessary; with the result that it was open to the defendant to rely at the hearing on the "want of conformity "point" and that it was open to him to rely upon it before this court.

It accordingly becomes necessary to consider whether the plaintiffs became holders in due course of the bills notwithstanding the omission of the word "company" from the indorsement. My brethren have so fully reviewed such authority as exists upon this matter that I will not take up time in considering the cases myself; none of them is decisive of the present problem. The question depends on whether the bills were "complete and regular "on the face of them" in spite of the omission to which I have referred. In the absence of any direct authority on the point the judge held that the absence of the word "company" from the indorsement was immaterial, and it seems that he founded his decision upon the combined effect of three elements, viz., (i) that the signature of the names of the two partners Fathi and Faysal Nabulsy by the hand of the one partner Faysal was the known and recognized signature of the partnership, (ii) that such signature would leave nobody in any reasonable doubt that the named payee intended to pass property in the bills to the bank, and (iii) that there was no evidence that Fathi and Faysal Nabulsy Company constituted a legal entity distinct from the two natural persons Fathi and Faysal Nabulsy. It is to be observed that of these three considerations the first and the third are peculiar to the circumstances of this particular case and are therefore not germane to Mr. Nelson's point of law, which is a perfectly general one. As to the second consideration, I agree that the indorsement, which in no way transgressed section 32 of the Act, passed to the bank the title of the indorsers. But if (as I think is the case) the judge intended to convey that because the indorsement sufficed to pass the title it necessarily follows that it was "complete and "regular" within the meaning of section 29, I find a difficulty in agreeing. It seems to me that that question depends not so much on whether the indorsers intended to pass the title and succeeded in doing so as between themselves and the indorsees, but whether it is apparent from the indorsement that they were the same persons as the payees and were accordingly the proper persons to make the indorsement.

Mr. Nelson's argument as to this is that (apart from titles of courtesy such as "The Hon.," "Mr.," etc.), there must be absolute conformity between the name or description of the payees and the name or description of the indorsers; and that in the absence of such conformity a holder of a bill cannot claim the

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special privileges which the Act confers on holders in due course, whatever rights he may have as a holder for value. Whether or not Mr. Nelson is right in the full scope of his contention, the word "company" clearly is, or may be, one of considerable legal significance. Following on the names of individuals and preceded by the word "and" it would probably denote a partnership. Without the word "and" (as in the case before us) it might (where the concern was an English one) denote either an unlimited company or an unregistered company, or (in the case of a foreign enterprise) a body possessing under the law of its domicile a legal entity of its own resembling that of a limited liability company in England. I think that one or other of these interpretations would be quite likely to appeal to the ordinary business man or banker; and I cannot think that the common sense view of the matter is that the word "company" adds nothing of significance to the individual names which precede it. In my opinion the average person would assume that the addition of the word "company" to (e.g.) "John & James Smith" was intended to have some meaning, and he would visualize from its presence something in the nature of a corporate entity or at all events some juridical conception which would not have occurred to him had the individual names stood alone. It would accordingly follow, in my judgment, in the present case that the omission of the word "company" from the indorsement would reasonably give rise to a doubt whether in point of personality the payees and the indorsers were necessarily the same; and if so the bills cannot, as I think, be said to be "complete and regular" on their face.

This view of the matter appears to be in conformity with that of Wright J. and of Scrutton L.J. in the *Slingsby* case,[22] and also with the evidence of banking practice (assuming it to have been admissible) which was called by the defendant in the present case; and accordingly, subject to the point next mentioned, I would be in favour of allowing the appeal.

I would add that I have not overlooked the considerations referred to by the judge which are special to this particular case and which I have previously mentioned, but they do not affect the conclusion at which I have arrived.

On the assumption that the "want of conformity" point was open to Mr. Nelson, and that the point should be decided

[22] [1931] 2 K.B. 589; [1932] 1 K.B. 544.

in favour of the defendant, Mr. Gardiner argued that the plaintiffs would nevertheless be entitled to succeed on the ground that they were holders for value. A claim on this footing was not pleaded and my brethren both take the view that on the principle that the greater includes the less, it was not necessary to plead it, inasmuch as the plaintiffs' claim to be holders in due course necessarily involved also the assertion of their rights as holders for value. On this view the defendant must be taken to have pleaded all defences on which he relied as an answer to a claim by the plaintiffs as holders for value, and as none of the defences which he did plead to the plaintiffs' statement of claim has succeeded the plaintiffs are entitled to judgment in that capacity. I do not dissent from this view, but I feel that it is very desirable that pleadings should show as plainly as possible what the issues between the parties are and that it would at all events be preferable that a plaintiff who intends to rely on his rights as a holder for value, if he fails in his claim to be a holder in due course, should say so expressly in his statement of claim. Had the plaintiffs done so in the present case, either in their original statement of claim or by amendment when Mr. Nelson introduced his argument under section 29 of the Act, it would have been clear beyond doubt what the issues were and the judge would not have felt himself precluded as, in his view, he was precluded, from forming or expressing a conclusion upon the plaintiffs' position as holders for value. However, as I have indicated, I do not dissent from the views of my brethren on this matter, which is one of procedure in a somewhat specialized field, and I accordingly concur in the proposed order dismissing the appeal.

With regard to the other matters which were argued before us I am entirely in agreement with the views which my Lord and Denning L.J. have expressed upon them and no useful purpose would be served by my adding any observations of my own.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester; Coward, Chance & Co.*

A. W. G.

C. A.

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Feb. 19.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

BAGLEY *v.* WINSOME AND NATIONAL PROVINCIAL BANK LD.

[H. 135]

Banking—Deposit account—Garnishee summons—Term of contract between bank and depositor not complied with by depositor—Whether garnishee order available against deposit account.

A creditor obtained judgment at a county court against a debtor for the sum owing of £32 and £18 costs. The judgment debtor had money in excess of £50 lying on deposit with the National Provincial Bank. The judgment debtor gave notice to the bank to withdraw his money on deposit, and that notice took effect on January 11, 1952. On that date the judgment creditor took out a garnishee summons which was heard on January 29, and a garnishee order was refused. The conditions on which the bank accepted deposit accounts included the following term: "Personal application must "be made and this book produced at the time when the money "is withdrawn. All withdrawals are subject to fourteen days' "notice":—

Held, that there was no debt owing or accruing which could be the subject of garnishee proceedings.

Appeal from the Mayor's and City of London Court.

On November 14, 1951, the creditor obtained judgment against the debtor in a county court for £32, £18 for costs. The debtor had more than that sum on deposit at a branch of the National Provincial Bank Ld. The contract between the debtor and the bank, so far as material, was: "Sums of £1 and upwards paid "into this account will bear interest at the current rate. The "interest will be credited yearly on December 31 and it is "requested that this book" (the deposit book) "be either "brought or sent to the bank in January in order that the interest "may be recorded therein. Personal application must be made "and this book produced at the bank when any money is with-"drawn. All withdrawals are subject to fourteen days' notice." The judgment debtor gave notice to the bank to withdraw the money in his deposit account, and that notice took effect on January 11, 1952. On that date the judgment creditor took out a garnishee summons under Ord. 27 of the County Court Rules, which was heard on January 29, 1952. The judge held that under the contract between the bank and the depositor it was a condition precedent to the money being withdrawn that the depositor should

[Reported by A. R. Colville, Barrister-at-Law.]

attend personally and produce his deposit book to the bank. Since this condition had not been satisfied there was no debt owing or accruing to the judgment debtor by the bank and the money on deposit could not be attached.

The judgment creditor appealed.

Claude Duveen for the judgment creditor. In *Joachimson* v. *Swiss Bank Corporation* [1] the court held that where money was standing to the credit of a customer on current account with a banker there was no debt between the bank and the customer until a demand had been made on the bank. Yet they held that a judgment creditor could attach a current account since the service of the garnishee summons could be taken as a demand. This has been the practice ever since. If it is possible to attach a current account despite the non-existence of a debt, because no demand has been served, it follows that it should be possible to attach a deposit account despite the fact that the depositor has not attended personally with his deposit book to receive the money.

The judgment debtor did not appear.

H. J. Phillimore and *Harris T. Walker* for the bank. Where, as in this case, it is a condition precedent to the withdrawal of money on a deposit account that the depositor should personally present the deposit book to the bank, the depositor has no cause of action against the bank until he has done so and the bank has refused payment. Consequently there is, in the meantime, no debt owing or accruing which can be the subject of garnishee proceedings. The judgment creditor has a remedy by equitable execution. The law as above stated has been settled for many years: see Paget's Law of Banking, 5th ed., p. 91; Paget's Law of Banking, 4th ed., to the same effect; Halsbury's Laws of England, 2nd ed., vol. 1, p. 802; Hart's Law of Banking, 4th ed., vol. 1, p. 277.

The principle of garnishee proceedings is that the judgment creditor can only step into the shoes of the judgment debtor: *Chatterton* v. *Watney*.[2] The words "owing or accruing" are defined in *Webb* v. *Stenton*.[3] The case here is analogous to *Cowley* v. *Taylor*,[4] and reference should be made to *McEvoy* v. *Belfast Banking Co. Ld.*[5] In *O'Driscoll* v. *Manchester Insurance Committee* [6] emphasis is put on the fact that a debt was no longer contingent, although it was payable in futuro, whereas in the present case the debt remains contingent. *Joachimson* v. *Swiss Bank Corporation*,[7] cited for the judgment creditor, deals with a current, and not with a deposit, account, and is not in point here.

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[1] [1921] 3 K.B. 110.
[2] (1881) 16 Ch.D. 378.
[3] (1883) 11 Q.B.D. 518.
[4] (1908) 124 L.T.J. 569.
[5] [1935] A.C. 24, 42.
[6] [1915] 3 K.B. 499, 516.

EVERSHED M.R. This appeal has raised a question of some difficulty and interest in regard to what are commonly known as garnishee proceedings. The proceedings in this case took place in the county court according to the appropriate terms of Ord. 27 of the County Court Rules, but it is convenient to state that, as counsel have both agreed, the matter does not fall in any way to be decided differently on that account from a case in which the proceedings occurred under Ord. 45 of the Rules of the Supreme Court.

The point may be formulated briefly. Under the rules, whether of the Supreme Court or of the county court, the creditor who has obtained judgment has available to him, as one form of executing his judgment, what is called attachment of debts by means of garnishee procedure, the subject-matter of which is described in both the rules as "debts owing or accruing from" a third party to the judgment debtor.

The question in this case is whether a sum deposited with the National Provincial Bank Ld. on deposit account by the judgment debtor, in respect of which at the material date (that is, the date of service of the garnishee summons) a notice of withdrawal had been given by the judgment debtor and had expired, is, within the formula, a debt owing or accruing from the National Provincial Bank Ld. to the judgment debtor.

The judgment creditor obtained a judgment for a sum which, with costs, amounted to £50 odd. The summons which has given rise to this problem was issued on January 11, 1952, that being the date on which the notice of withdrawal given by the judgment debtor expired. I have been careful to refer only to the National Provincial Bank Ld., because it is only with the contract between that bank and this debtor that we are now concerned. It is, I think, well known (and references to this effect may be found in the books) that contracts relative to what are now called deposit accounts may vary between one banking house and another. The contract in this case which was in operation between the National Provincial Bank Ld. and the judgment debtor provided, so far as material, as follows: "Sums of £1 and upwards paid into this

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[7] [1921] 3 K.B. 110.

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"account will bear interest at the current rate. The interest will "be credited yearly on December 31 and it is requested that this "book be either brought or sent to the bank in January in order "that the interest may be recorded therein." The reference to "this book" is a reference to the fact that the terms I am reading are written in the book in which the sums deposited, the interest, and such like, are recorded. The contract continued: "Personal application must be made and this book produced at "the bank when any money is withdrawn. All withdrawals are "subject to fourteen days' notice." Then there is a reference to change of address. It therefore follows, as I think, tolerably clearly, that the bargain between the banker and the customer in this case was that the bank would credit the depositor with interest on the sums deposited as stated in the terms I have read, and that the bank should only be liable to pay the whole or any part of the sums deposited upon two conditions being satisfied (unless of course they were waived by the bank): first, that 14 days' notice should be given of any withdrawal, that is, of any claim to repayment, and, secondly, that when the time came for repayment the depositor should attend personally and produce the deposit book. I have said that the notice of withdrawal in this case had been given and had expired at the relevant date, so that beyond doubt that first condition was satisfied. But it appears that, notwithstanding, the debtor has not yet presented himself, and has not presented himself armed with his deposit account book, at the branch in question of the National Provincial Bank Ld., and, therefore, of course, the sum deposited still remains with the bankers. In the circumstances, is the sum standing to the credit of this depositor with this bank a debt "owing or accruing" from the bank to him? For, unless it is, plainly it is not a proper subject of this form of execution.

We have been referred to a number of cases which throw some light, on occasions a little indirectly, and on other occasions of a rather tantalizing character, upon the problem; but it is quite certain that this particular problem has never been decided, so far as the researches of counsel have been able to discover, in any previous case.

It is convenient to start with a reference to the decision of this court in *Webb* v. *Stenton.*[8] In that case an explanation was given which I think is applicable, and which I am prepared to adopt and apply, of the meaning of this phrase "debts owing

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[8] 11 Q.B.D. 518.

"or accruing." That was a case in which the creditor claimed by this procedure of execution to get possession of the income of a trust fund held by trustees, in which the judgment debtor had a limited interest. The facts do not matter, but the members of this court made it plain that by the formula "debts "owing or accruing" was meant debts which were then owing, debts due in praesenti, whether or not they were immediately payable. Thus a debt which had accrued due, but was not payable for, say, a month, or until some future date, was within the phrase "debts owing or accruing." Such a construction of the phrase enables a judgment creditor in garnishee proceedings to attach a debt which is payable over a number of instalments.

With that much assistance, I turn to a consideration of the present case. It has for a long time been well established (and it is common practice) that this form of execution is available in the case of a current account with a banker. Until the year 1921 it was not indeed apprehended that there was any problem involved, having regard to the contract between banker and customer, by that fact; but in that year there came to be decided, again in this court, *Joachimson* v. *Swiss Bank Corporation*.[9] The problem of the true nature of garnishee proceedings in relation to current accounts was indirectly raised, for the matter in question was whether the plaintiffs, Joachimson (a firm), could say that a cause of action had accrued against the defendant bank in the absence of a demand made, and the Court of Appeal held that in the case of a current account a cause of action did not arise until the demand had been made. In the course of the argument the attention of the court was drawn to the question, if that were so, how could the well-established garnishee procedure in relation to current accounts be justified, since at any rate in nine cases out of ten no demand for payment would have been made at the time when the garnishee proceedings occurred? It was, I think, a serious problem. But the three members of the court said that they were undaunted by that consideration in adhering to the conclusion at which they had arrived in the particular case, and were content to say, in effect: "The service "of the garnishee summons should be taken as operating as a "demand, and that would get out of the difficulty." Although it was not strictly necessary for them to decide the point, I think they clearly indicated that the answer to the point was as I have stated it, and, as Mr. Duveen in his reply indicated, I think the later case in this court, *Rekstin* v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ld.*,[10] shows that such a view must now be taken as accepted: see, for example, the judgment of Slesser L.J. in that case.[11]

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[9] [1921] 3 K.B. 110.

Mr. Duveen contends that if the service of a garnishee summons can operate as a demand by the judgment debtor, there is no logical reason why it should not be taken as operating in satisfaction of any other conditions such as apply in the case of a deposit account. I cannot accept that argument. It seems to me that the two conditions with which we are concerned in this contract, that of the demand on the one hand, and that of the personal application with the production of the deposit book on the other hand, are of a somewhat different character. The deposit book, as I have already indicated, is the document of title to the deposit account, and indeed, as other cases have illustrated, delivery of it to a third person may operate as an effective donatio mortis causa. On the other hand, I think it is an unnatural and wrong use of language to suggest that where, as here, a notice of withdrawal has been given, there remains a contingent debt. If the service of the notice of withdrawal can be regarded as a demand for payment, still the bank is entitled to rely and insist upon the contract which obliges them to pay only upon satisfaction of the other condition. That condition may or may not be satisfied at some indefinite future time, and in the meantime the judgment creditor cannot, as it seems to me, be in a better position than the party to the contract with the bank, namely, the judgment debtor. I am not, therefore, satisfied that in such a case as the present, on the facts that I have stated, the deposit account can and should be treated, as a consequence of the decision in *Joachimson* v. *Swiss Bank Corporation*,[12] as a debt "owing or accruing" within the meaning of the relevant rules.

There have been other cases in which some oblique references have been made to the case of a deposit account. I cannot refrain from a brief reference to one of the earliest, *Atkinson* v. *Bradford Third Equitable Benefit Building Society*,[13] for it was in that case that Lord Esher M.R. pointed out that the case of money paid into a deposit account would be very different from the case he was there considering (the case of money lent to a building society), and he went on to whet the appetite, without satisfying

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[10] [1933] 1 K.B. 47.
[11] Ibid. 68.
[12] [1921] 3 K.B. 110.
[13] (1890) 25 Q.B.D. 377.

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it, by saying[14]: "We shall know how to deal with it"—that is the case of a deposit account—"when it comes before us." It did not come before the court in Lord Esher's day, but it has come before the court now, two generations later. In *Atkinson's* case[15] the terms of the contract with the building society to which money had been lent required that notice should be given of a certain length of time before the lender could withdraw the money, and it also included the term that the depositor, the lender, should attend personally or send written authority, and produce his investor's book. The building society had pleaded, after a demand for payment had been made that the claim was then barred by the Statute of Limitations; and the answer of the court was that since no notice of withdrawal had been given, therefore the statute had not begun to run at the time when the defendants said that it had. That case is, therefore, not entirely dissimilar from the case of a deposit account, for it showed that the special terms of the contract govern the obligation of the banker or borrower of the money to repay. It is possible to imagine other cases of a similar character. A man may lend to a company money on, say, an unsecured debenture, whereby the company would only be liable to pay on the satisfaction of certain contractual terms or conditions. Until those terms or conditions had been satisfied it would, I think, be very difficult to say that such a debt had arisen as is contemplated by the relevant rules.

Another case—and it shall be the last of those that I have noted—is the case of *O'Driscoll and Another* v. *Manchester Insurance Committee.*[16] That illustrates the opposite conclusion, for it was a case where a doctor under certain contractual arrangements that need not be elaborated became entitled to a certain share of an insurance pool under the National Insurance Act, 1911, which was calculated and made payable at certain specified intervals. At the relevant date it was not in dispute that the doctor was entitled to a certain share, though its precise amount had not fallen to be computed, and it was, therefore, a case of debitum in praesenti but solvendum in futuro, and therefore a debt within the formula that we find in the rules. The matter was stated shortly in this language by Swinfen Eady L.J.[17]: "It was not "presently payable, the amount not being ascertained, but it was "a debt to which the doctors were absolutely and not contin-"gently entitled. The only question was as to the amount of

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[14] 25 Q.B.D. 377, 380–1.

[15] Ibid. 377.

[16] [1915] 3 K.B. 499.

[17] Ibid. 512.

"the debt, the debt not being payable until the amount had been "ascertained."

It was Mr. Duveen's argument that as a matter of principle this case should be treated as in pari materia with such a case as that which I have last cited. The production of the book, after all (he said), is a matter of mere formality. The judgment debtor has given notice to withdraw. The debt is now, in ordinary parlance, payable subject only to compliance on the part of the judgment debtor with conditions, which the bank is, of course, entitled to enforce, but which amount to no more than a mere formality; for if the judgment debtor had lost his deposit book no doubt the judgment debtor in the circumstances would in a court be able to recover payment, notwithstanding. I concede that the distinctions between one class of case and another are apt to be somewhat narrow, but still, reverting for the moment again to *O'Driscoll and Another* v. *Manchester Insurance Committee*,[17] it cannot be said here that the only question remaining is that of amount. What is here outstanding is that the contract relating to the deposit requires certain things to be done before the bank is under an obligation to pay. I should assume from the negative results with which counsel's researches have met, as well as from reference to the textbooks, that this form of execution has never been treated, during the long period when it has been available, as applicable to deposit accounts. I am fortified much in that view by the reference which Mr. Phillimore made to Sir John Paget's Law of Banking. I have the fifth edition, which is in date shortly after the death of Sir John Paget. It is there stated quite clearly (Chap. 6, pp. 90 et seq.) that the case of a deposit account differs in this respect from the case of a current account, and that garnishee proceedings will not be available as a means of execution against a deposit account. I will read a short sentence from p. 92: "Apart from any question "of the deposit being repayable on demand, at notice, or at a "fixed period, it would seem clear that if the return of the receipt "is by agreement of the parties, express or implied, made a "condition precedent to withdrawal or repayment, garnishee proceedings will not lie against the deposit account." Mr. Phillimore read us the corresponding passage from the earlier edition by the author himself, in which the matter is a little more fully stated, but clearly to the same effect. That reference reinforces the view that, over what is now a very long period,

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[17] [1915] 3 K.B. 499.

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deposit accounts have not been regarded as liable to this type of execution.

I think Mr. Duveen is entitled to say that before the decision in *Joachimson* v. *Swiss Bank Corporation*[18] the distinction for this purpose between the deposit account and the current account may not, to say the least, have been clearly apprehended; but I am still, for my part, of opinion, and for reasons I have given, that it would not be right to say that the reconciliation of the *Joachimson* v. *Swiss Bank Corporation* decision[18] with the continuing practice of garnishee proceedings against current accounts involves at this day and age, for the first time, making that form of procedure available also against a deposit account. The judgment creditor is not, after all, left without remedy; there are other forms of execution, for example, equitable execution by way of appointment of a receiver. I think then on the whole, and for the reasons which I have given, that it would not now be right for this court to reverse a practice of such long standing. And I am not clear how far such a reversal would go, and what other types of contract might then be held to be liable to a similar form of attachment, and to what extent as a consequence third parties might be at serious risk. I therefore conclude that the decision of the judge was correct, and I think this appeal should be dismissed.

JENKINS L.J. I agree. Prima facie it would be wrong in principle for garnishee proceedings to have the effect of putting the judgment creditor in a better position as against the garnishee than the judgment debtor himself would have been. That, so far as I can see, is exactly what we are being asked to do in the present case. The judgment debtor could not obtain payment from the bank of the money in his deposit account without making a personal application and producing his deposit book. It is now claimed that the bank, at the instance of the judgment creditor, should be compelled to make payment without compliance with those stipulations. That seems to me to be wrong in principle, and there is nothing in the authorities to the effect that we ought to hold otherwise. As to *Joachimson* v. *Swiss Bank Corporation*,[18] approved in *Rekstin* v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ld.*,[19] it is, to my mind, one proposition to hold that a garnishee order nisi should be treated as equivalent to a simple demand by the judgment debtor, in a case in which a simple demand is all that is necessary in order to make the garnishee immediately liable, and quite another to say that such an order is to be taken in substitution for, and as the equivalent of, such a condition or stipulation as the production of a deposit book. I agree that the appeal fails.

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[18] [1921] 3 K.B. 110.

[19] [1933] 1 K.B. 47.

HODSON L.J. One of the terms of the contract between the debtor and the bank was that personal application must be made, and the deposit book produced, at the bank when money was withdrawn. That condition of the contract was not complied with. Mr. Duveen, on behalf of the creditor, in seeking to avail himself of garnishee proceedings in the county court, relied strongly on the case of *Joachimson* v. *Swiss Bank Corporation*,[20] to which reference has already been made. That case dealt with the relationship between banker and customer, and decided that where money was standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against a banker for money lent. A distinction was drawn between the position of a bank and its customers, on the one hand, and the position of other debtors and creditors on the other, the banker not being in the position of a debtor who was bound to find out the creditor and pay him the debt when due. The decision in that case, in itself, was, therefore, against the contention of Mr. Duveen. However, counsel in arguing that case pointed out that the decision at which the court arrived would apparently throw doubt on the validity of garnishee orders, and two members of the court in clear terms, and the third member in less definite terms, expressed the view that garnishee orders would nevertheless be good, because the service of the order nisi would operate as a demand and take the place of the demand of the customer. It could not be said that those observations were mere obiter dicta, because they were affirmed by a further decision of the Court of Appeal in *Rekstin* v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ld.*,[21] where the point was directly raised.

Therefore, it is argued that, since where certain terms of the contract have not been complied with between the customer and the bank, nevertheless garnishee proceedings are not made inapplicable, that there is no reason why one particular term should be preferred to another.

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[20] [1921] 3 K.B. 110.

[21] [1933] 1 K.B. 47.

Mr. Duveen says: "As the garnishee order nisi takes the "place of the demand, why should it not also take the place of "the production of the deposit book?" I agree with my Lords that it is not right to take that further step. The authorities stop short of supporting the view that the contract between the customer and the bank should be treated as performed by the issue of the garnishee order where the step required by the contract, viz., the production of the book, has not been taken. The consequences of taking the further step contended for by Mr. Duveen in this case would, I think, lead to great difficulties.

I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade; Wilde, Sapte & Co.*

C. A.
1952
Feb. 28;
Mar. 14.

Somervell, Denning and Romer L.JJ.

STRAND ELECTRIC AND ENGINEERING CO. LD. v. BRISFORD ENTERTAINMENTS LD.

[1951 S. No. 1049.]

Damages—Detinue—Detention of goods—Profit-earning chattels—User by defendant—Measure of damages.

In an action in detinue in respect of a chattel which the plaintiff, as part of his business, hires out to users, the plaintiff, if the defendant has during the period of detention made beneficial use of the chattel, is entitled to recover as damages the full market rate of hire for the whole period of detention.

Although, where there is a bona fide doubt as to the plaintiff's title to the chattel, the defendant is entitled to a reasonable time for investigation, that principle does not apply to a defendant who persists in retaining the chattel when there is no doubt as to the ownership, and the wrong relates back to the first taking possession by the defendant.

APPEAL from Pilcher J.

In 1949, the defendants, Brisford Entertainments Ld., were negotiating for the sale of a theatre to the Bedford Theatre (London) Ld., and that company was permitted to go into possession before completion of the purchase. Under a contract made by it with the plaintiffs, the Bedford Theatre (London) Co. were lent by the plaintiffs certain portable switchboards, pending the manufacture and installation by the plaintiffs of permanent switchboards. No hire was charged in the first instance, but as the Bedford Theatre Co. failed to take delivery of the permanent switchboards, but desired to retain the portable apparatus, it was agreed that as from January 1, 1951, the company should pay the plaintiffs' usual charge of £9 6s. 8d. per week. The hiring out of portable switchboards was a normal part of the plaintiffs' business. On January 8 the defendants, Brisford Entertainments Ld., took possession of the theatre and gave instructions that nothing whatsoever must be removed, and the Bedford Theatre Co. disclaimed any responsibility for the plaintiffs' hire equipment as from that date.

Between January and March, 1951, the plaintiffs wrote a number of letters to the defendants, demanding the return of their equipment, but received neither their property nor any satisfactory reply. On March 17, 1951, the plaintiffs issued a writ claiming the return of their equipment or its value, and damages for the period of its detention, which at the trial was shown to be for 43 weeks.

On November 16 the judge made an order for the return of the goods or for a sum of £714, their value, and for damages, which he assessed at £200. He deducted a period of a month as a reasonable time to allow the defendants in which to investigate the situation and consider their position. He also made allowance for the possibility that if returned to the plaintiffs some of the switchboards might not have been on hire for the whole period of 43 weeks, or might have been accidentally destroyed.

The plaintiffs appealed against the assessment of damages for detention. They submitted that the judge had assessed the damages on a wrong basis.

Caplan for the plaintiffs. The appeal raises questions of general importance to a very large number of traders, namely: (1) Where a chattel of the kind that is hired out by the owner in the course of his business is wrongfully detained for a period by the defendant for purposes of his own, are the damages that the defendant must pay to be measured by the reasonable market rate of hire for that period, or are they a lesser sum, equal to the reasonable hiring charges for such proportion only of the period during which the plaintiff might probably have been able to hire out the chattel, if returned to him? (2) In assessing damages for detention, should allowance be made for the fact that if the chattel had been returned it might have been damaged or destroyed in the plaintiffs' possession? (3) Is the defendant entitled to an allowance of a reasonable period of time in which to investigate the plaintiffs' title, if the defendant's sole purpose is to retain possession for his own use?

It is submitted that if an article has a market hiring value that is the measure of damages where the defendant by wrongful detention has had the beneficial use of the article. If there is only a consumption value and not a user value then the measure of damages for detention is a sum equal to the interest on the use of the capital sum representing the value of the article for the whole period in question: see *Peruvian Guano Co.* v. *Dreyfus Bros.*[1] This latter proposition is the only one on which I can find direct authority. The textwriters do not seem to have dealt with the question of damages for loss of use of chattels by detention. But in the Year Book, 1479, Catesby (counsel) said: "If you get "from me my horse to ride to York, and you ride further to "Colbrugh, I shall have a writ of detinue and recover the horse "and then I shall have action on my case and recover damages "for the use of the services of my horse outside the agreement."[2] If the plaintiffs had had to hire other equipment to replace that detained they would undoubtedly have been entitled to claim as damages the cost of that hire. Deterioration by use is also an element of damage in addition to annual rent or hire. The defendant has no concern with what use the plaintiff would make of the chattel. Lord Halsbury's observations on pure detinue in *The Mediana*[3] were perfectly correct, whatever modifications of that decision may have occurred in other cases. It would be wrong to allow a defendant who detains goods to profit by his wrongdoing, by having to pay less in damages than he would pay for hiring the goods.

The judge found that the defendant was determined to retain the goods for his own purpose. Yet he seems to have assumed that anybody who detained goods was entitled to reasonable time for investigation of title, although on the judge's finding the defendant did not want to investigate that title.

I. Warren for the defendants. The true rule in modern English law is that in all cases of unlawful detention a jury may give as damages whatever they think is the proper equivalent in money to compensate the plaintiff for what he has lost. Any gains made by the defendant must not be taken into consideration. I found the defendants' case principally upon the observations of Lord Halsbury L.C. in *The Mediana.*[3] If what he said properly represents the law then the argument for the plaintiff is untenable. Lord Halsbury is saying that the unlawful withdrawal of a chattel is a wrong which must cause some loss and juries must do the best they can to compensate the plaintiff for that loss, and that there is one rule for the assessment of damages, covering all forms of wrongful detention. To adopt any other principle than that the plaintiff must prove his loss would result in considerable difficulty. There is in the present case no satisfactory finding by the judge of beneficial user of the switchboards by the defendants. The allowance by the judge of time for investigation merely comes down to this: unlawful detention being proved, the judge came to the conclusion that the unlawful detention commenced when the defendants should have come to the conclusion that the chattels should be returned.

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[1] [1892] A.C. 166.

[2] Y.B. 18 Edw. IV, Hil., pl. 5.

[3] [1900] A.C. 113, 117.

Caplan in reply.

Cur. adv. vult.

March 13. The following judgments were read:—

Somervell L.J., having stated the facts, continued:—The main contest turned on the judge's basis for assessing damages. What he did was this. He considered what sum the plaintiffs might have been expected to realize by hiring out these switchboards if they had been returned when they should have been. He took into account the fact that of some 80 switchboards of this kind, owned by the plaintiffs, about 75 per cent. were out on loan or hire at any one time; that not infrequently, as here, they were loaned gratis for a period; that in other cases there was a 40 per cent. reduction from the £9 6s. 8d.; that the switchboards might have been accidentally destroyed. The full figure for 39 weeks at £9 6s. 8d. was something under £400. The judge awarded £200.

If this had been a case where the plaintiffs had been deprived of the use of their switchboards because they had been damaged by the negligence of the defendants the principles applied by the judge would, I think, have been right. It is, however, submitted that in a claim in detinue, and one in which the defendants have used a profit-earning chattel, they must pay by way of damages a fair sum for that user. They cannot, as wrongdoers, have the use of the chattels for less than a fair price for their hire. Otherwise they would be benefiting by their own wrong.

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[3] [1900] A.C. 113, 117.

It is curious that there is no authority on the point. Before considering it I will deal with the judge's finding on user. He found that the defendants did not want to let the plaintiffs remove their apparatus from the theatre because without it the theatre could not be let or sold. The theatre was not over the relevant period being used as a theatre, but a prospective purchaser or lessee would presumably want to see, and, if the theatre was taken, to operate the stage lighting. The judge finds that the defendant company was determined not to let the plaintiffs have their switchboards returned for the reason that without the switchboards the theatre was virtually useless. From the facts to which I have referred permanent switchboards, to replace the plaintiffs' portable switchboards, might take some time to obtain. Later in his judgment the judge said that there was no evidence of "commercial user," though he did not regard that as important. He was no doubt referring to the fact that the theatre was not used as a theatre. The findings must be read together and the conclusion, to my mind, is that the defendants "used" the plaintiffs' articles. There may be a distinction in the measure of damage in detinue between, say, a warehouseman who merely stores and a person who during the period of detention enjoys the beneficial use of the chattels. It is the latter case with which, in my opinion, we are concerned.

Both counsel referred to the well-known case of *The Mediana*,[4] and sought to support their arguments by dicta from the speech of Lord Halsbury L.C. In that case the plaintiffs' lightship was damaged in a collision by the negligence of the defendants. The plaintiffs were a harbour board and the lightship was not, in their hands, a profit-earning asset. They had a spare lightship and did not have to hire a substitute during the period the lightship was out of action as the result of the collision. It was argued, therefore, that under this head they could recover only nominal damages. They had suffered no loss. The House of Lords held that the case was governed by their earlier decision in *The Greta Holme*,[5] and that the plaintiffs were entitled to substantial damages.

In the course of the argument for the appellants that nominal damages only could be recovered, counsel is reported as saying: "This is not a case of trover or detinue in which damages may

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[4] [1900] A.C. 113, 115.

[5] [1897] A.C. 596.

"be given on grounds not applicable here." The sentence in Lord Halsbury's speech on which Mr. Caplan, for the plaintiffs, relies is the sentence "What right has a wrongdoer to consider "what use you are going to make of your vessel?"[6] Lord Halsbury says that a defendant who had deprived the plaintiff of the use of a chair could not diminish damages by showing that the plaintiff did not usually sit on it. The damages are at large, they are a matter for the jury but are not nominal. In a later passage, on which Mr. Warren relies for the defendants, Lord Halsbury referred to the passage which I quoted from the argument and says: "Of course I observe that it has been suggested "that this was not an action for trover or detinue; but, although "those are different forms of action, the principle upon which "damages are to be assessed does not depend upon the form of "action at all."[7] He goes on to except punitive damages in trespass.

In *Admiralty Commissioners* v. *S.S. Valeria*,[8] which was also a collision case, Lord Buckmaster distinguished *The Greta Holme* and *The Mediana* in that there the subject matter of the suit was a vessel which in the ordinary course would have earned nothing at all. With regard to a freight-earning vessel Lord Buckmaster said: "What has to be considered is what would "this vessel have earned for the period of the seven days that "she was incapacitated owing to the accident; and that amount "is the true measure of the damage which the vessel who was "to blame is called on to pay."[9] That decision, I think, shows that what Lord Halsbury said must be confined to the class of case which he was considering, and, with great respect, his statement that the principle upon which damages are to be assessed does not depend upon the form of action at all is too widely stated, unless one construes the word "principle" in a very general sense as meaning reparation to the injured party for the wrongful act and its natural and direct consequences. (See *The Susquehanna*.[10])

The Mediana[11] was a claim in negligence in respect of a chattel which did not, in the hands of the plaintiff, earn profits. In the present case the chattel was profit-earning in the hands of the plaintiffs. The judge applied the principle as laid down in *The S.S. Valeria*.[12] The question is whether that is the right measure in this case. This is a claim in detinue. On the findings, the defendants had for their own benefit the use of the plaintiffs' chattels. This is an incident which is not present in the damage by negligence cases. Why is not the plaintiffs' loss the value in the market of the user? The wrong is not the mere deprivation, as in negligence and possibly some detinue cases, but the user. I am, of course, not overlooking the fact that if the chattel has been damaged and depreciated this may be an item in a claim for special damage. There are no doubt some cases in which a wrongdoer may be called on to account for profits, but in considering the measure of damages as raised here I think the actual benefit which the defendants have obtained is irrelevant. The damages could not, in my view, be increased by showing that a defendant had made by his use of the chattels much more than the market rate of hire. Equally they cannot be diminished by showing that he had made less.

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[6] [1900] A.C. 117.
[7] Ibid. 118.
[8] [1922] 2 A.C. 242.
[9] Ibid. 247.
[10] [1926] A.C. 655, 661.
[11] [1900] A.C. 113.
[12] [1922] 2 A.C. 242.

It is curious, as I have said, that there is no authority on this point. The nearest analogy ~~is a claim for mesne~~ profits. The measure there is a reasonable sum in the nature of rent for the user during the period of the defendant's trespass. In other words, the defendant must pay what the plaintiff would have obtained if the defendant had lawfully been in possession. In principle the same measure should, I think, apply where a defendant has detained and used a chattel of the plaintiff which the plaintiff, as part of his business, hires out to users. I have added these latter words because I do not wish in this so far uncharted field to go beyond the facts of the case. We were referred to statements as to the law in the United States of America. (See Sedgwick on Damages, Vol. 11, 1031 and 1045; Corpus Juris Secundum, col. 26, p. 1286.) It would appear from the statements in these books that the principle may be more widely applied in the United States of America and would cover, for example, detention and use of a private motor-car. I am not saying this is wrong. There may be no distinction in principle. The question had, however, better be left till it arises.

I will now deal with the judge's deduction of a month for investigation. It is true that in deciding whether a conversion has taken place a refusal by a defendant who has a bona fide doubt as to the plaintiff's title will not necessarily establish conversion. It was for the jury to consider whether the defendant was disputing the plaintiff's title or was merely asking for a reasonable time to clear up a bona fide doubt: *Pillott* v. *Wilkinson*.[13] I cannot think this principle is available to a defendant who, as in the present case, persists in retaining the goods long after a reasonable time has expired. The judge's findings lead to the conclusion that the defendants were determined to retain the goods irrespective of the plaintiffs' title, and I do not, with respect, think that they can claim to deduct a notional period for investigation.

I therefore think that the plaintiffs are entitled to a sum representing the reasonable hire of the goods over 43 weeks. The judge accepted the plaintiffs' figure for hire, and, in my opinion, the appeal should be allowed and judgment entered for £401 6s. 8d.

Denning L.J. In assessing damages, whether for a breach of contract or for a tort, the general rule is that the plaintiff recovers the loss he has suffered, no more and no less. This rule is, however, often departed from. Thus in cases where the damage claimed is too remote in law the plaintiff recovers less than his real loss: *Liesbosch Dredger (Owners)* v. *Edison S.S. (Owners)*.[14] In other cases the plaintiff may get more than his real loss. Thus, where the damage suffered by the plaintiff is recouped or lessened owing to some reason with which the defendant is not concerned, the plaintiff gets full damages without any deduction on that account: *Slater* v. *Hoyle & Smith Ld.*[15]; *Smiley* v. *Townshend*[16]; *Haviland* v. *Long*.[17] Again, in cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it, even though the plaintiff has lost nothing and suffered no damage: *Reading* v. *Attorney-General*.[18]

The question in this case is: What is the proper measure of damages for the wrongful detention of goods? Does it fall within the general rule that the plaintiff only recovers for the loss he has suffered or within some other, and if so what, rule? It is strange that there is no authority upon this point in English law; but there is plenty on the analogous case of detention of land. The rule there is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So also a wrongdoer who uses land for his own purposes without the owner's consent, as, for instance, for a fair ground, or as a wayleave, must pay a reasonable hire for it, even though he has done no damage to the land at all: *Whitwham* v. *Westminster Brymbo Coal Company.*[19] I see no reason why the same principle should not apply to detention of goods.

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[13] (1864) 3 H. & C. 345.

[14] [1933] A.C. 449.

[15] [1920] 2 K.B. 11.

[16] [1950] 2 K.B. 311.

[17] Ante, 80.

[18] [1951] A.C. 507.

If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire. This will cover, of course, the wear and tear which is ordinarily included in a hiring charge; but for any further damage the wrongdoer must pay extra. I do not mean to suggest that an owner who has suffered greater loss will not be able to recover it. Suppose that a man used a car in his business, and owing to its detention he had to hire a substitute at an increased cost, he would clearly be able to recover the cost of the substitute. In such cases the plaintiff recovers his actual loss. I am not concerned with those cases.

I am here concerned with the cases where the owner has in fact suffered no loss, or less loss than is represented by a hiring charge. In such cases if the wrongdoer has in fact used the goods he must pay a reasonable hire for them. Nor do I mean to suggest that a wrongdoer who has merely detained the goods and not used them would have to pay a hiring charge. The damages for detention recoverable against a carrier or a warehouseman have never been measured by a hiring charge. They are measured by the loss actually sustained by the plaintiff, subject, of course, to questions of remoteness. They are like cases of injury to a ship or a car by negligence. If it is put out of action during repair the wrongdoer is only liable for the loss suffered by the plaintiff. (See the principles set out in *The Susquehanna*,[20] and many other cases.) The claim for a hiring charge is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters. I can imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel, but I do not think this is such a case.

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[19] [1896] 2 Ch. 538.

[20] [1926] A.C. 655.

If the goods are retained by the wrongdoer up till judgment, the hiring charge runs up to that time, and in addition the owner will get the return of the goods or their value at the time of judgment (*Rosenthal* v. *Alderton & Sons Ld.*[21]); but if the goods have been disposed of by the wrongdoer the hiring charge will cease at the time of such disposal, but the owner will get in addition damages for the loss he has sustained by the conversion, which is usually the value at the time of conversion. (See *S.S. Celia* v. *S.S. Volturno*,[22] and cf. *Sachs* v. *Miklos and Others.*[23]) In the present case the defendants retained the goods until judgment, but have returned them in pursuance of the judgment. In these circumstances the hiring charge runs up to the date when the goods were returned. It starts from the very moment when the defendants took possession of the goods. They had, it is true, a reasonable time to make inquiries as to title, but once that time expired and they wrongly decided to retain them, then the wrong related back to the first taking. It became wrongful ab initio.

I ought perhaps to add a word about the cases to which we were referred. Mr. Caplan read to us a passage from Holdsworth's History of English Law, Vol. 7, p. 445, which quoted from the Year Book for the year 1479. I have looked up the origin of this quotation and find that it was a statement by counsel, Serjeant Catesby, in the course of an argument two years before he was made a judge; and it was immediately rejected by Brian C.J. It is therefore no help to us. With regard to *The Mediana*[24] I need only say that Lord Halsbury was not dealing with a case where the defendant had actually used the goods.

In my opinion the plaintiffs in this case are entitled to the full hiring charge for the full period of 43 weeks, without any of the deductions allowed by the judge. I agree that the appeal should be allowed.

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[21] [1946] K.B. 374.

[22] [1921] 2 A.C. 544, 548, 556, 563.

[23] [1948] 2 K.B. 23.

[24] [1900] A.C. 113.

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STRAND ELECTRIC & ENGINEERING CO. LD. v. BRISFORD ENTERTAINMENTS LD.

ROMER L.J. In my judgment the three salient facts on which the assessment of damages in this case depends are, first, that the equipment of the plaintiffs which the defendants detained was profit-earning property; secondly, that the plaintiffs normally hired out the equipment in the course of their business; and, thirdly, that the defendants during the period of wrongful detention applied the property to the furtherance of their own ends. As to the third point, the defendants sought before us to contend that they could not be said to have used the equipment because they did not actively operate the switchboards. This, in my opinion, is immaterial. The judge found that Mrs. Pearlberg (who substantially owns the defendant company) refused to return the equipment to the plaintiffs because, without it, the Bedford Theatre could not be let or sold. This finding establishes, in my judgment, that the defendants put the switchboards to the use of making their theatre more attractive and more readily disposable than it would have been without them. This amounts to a use of the equipment by the defendants for their own purposes.

In the light, then, of these three established facts the question is whether Mr. Caplan is right in his proposition that if the use of an article has a recognized hiring value then such value constitutes the measure of damages recoverable by the owner from a defendant who, by wrongful detention, has the use of that article. Although, curiously enough, this question seems never to have come up for decision in our courts, I am of opinion that on principle Mr. Caplan's proposition is sound. The fundamental aim in awarding damages is in general to compensate the party aggrieved. The inquiry is: What loss has the plaintiff suffered by reason of the defendants' wrongful act? In determining the answer to this inquiry the question of quantifying the profit or benefit which the defendant has derived from his wrongful act does not arise; for there is no necessary relation between the plaintiffs' loss and the defendants' gain. It follows that in assessing the plaintiffs' loss in the present case one is not troubled by any need to evaluate the actual benefit which resulted to the defendants by having the plaintiffs' equipment at their disposal.

That element then being out of the way, the only substantial reason put forward by the defendants why the plaintiffs should not receive the full hiring value of the equipment during the period of detention is that the plaintiffs might not have been able to find a hirer. In my judgment, however, a defendant who has wrongfully detained and profited from the property of someone else cannot avail himself of a hypothesis such as this. It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all. Apart from the minor matters which I mention later, it accordingly seems to me that the defendants are bound to pay the recognized hiring value for the property in question and that no sufficient answer has been made out to Mr. Caplan's proposition which, in my judgment, has common sense to support it and no authority against it.

I say this because some reliance was placed by counsel for the defendants on the principles which have become established in assessing damages for negligence. (See, for example, *Admiralty Commissioners* v. *S.S. Susquehanna.*[25]) These principles seem to me to have no relation to cases where a wrongdoer detains property of another and uses it for his own purposes; one can postulate, as I have already indicated, that such a wrongdoer would have preferred to pay for the use of the property rather than have gone without it, but no such assumption can be made where negligence and not improper user is involved.

I agree with my Lord that in this comparatively virgin field it is better to confine our decision to the actual facts before us; and I express no opinion as to what the plaintiffs' rights would have been in the matter of damages had the property detained been of a non-profit earning character, or if, although profit-earning, the plaintiffs had never applied it to remunerative purposes. The full hiring charge for the switchboards over the period of unlawful detention has been found to be just over £400, and it follows from what I have said that in the absence of other considerations that is the sum which, in my judgment, should be awarded as damages to the plaintiffs.

It is said, however, on behalf of the defendants, first, that they should not be charged for the use of the equipment during such reasonable time as was necessary for them to satisfy themselves with regard to the plaintiffs' title; and, secondly, that some allowance should be made for the possibility that the equipment might have suffered damage, or even destruction, during the period of detention, if it had been restored to the plaintiffs at the

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[25] [1926] A.C. 655.

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STRAND ELECTRIC & ENGINEERING CO. LD. *v.* BRISFORD ENTERTAINMENTS LD.

Romer L.J.

beginning of that period. I do not think there is anything in either of these points. As to the first, not only is there no evidence that the defendants ever entertained any doubt as to the plaintiffs' title or applied themselves to inquiring into that matter, but the evidence shows, and the learned judge so found, that from first to last the defendants' sole reason for refusing to deliver up the equipment was that they wanted to keep it themselves. Then, as to the possibility of damage to the equipment if the plaintiffs had been given possession of it, this is not a contingency of which, in my judgment, any account should be taken in the present action, although it would have had some relevance if the defendants had been sued for negligence.

I accordingly agree that the appeal should be allowed and that the damages awarded to the plaintiffs should be increased from £200 to £401 6s. 8d.

Appeal allowed.

Solicitors: *Samuel Tonkin & Co.; M. Wilson Prentis.*

A. W. G.

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1952
Feb. 28, 29.

Evershed M.R., Jenkins and Hodson L.JJ.

JOHN KAY LD. *v.* KAY AND ANOTHER.

[Plaint No. G. 4814.]

JOHN KAY LD. *v.* KAY AND ANOTHER.

[Plaint No. G. 4815.]

Landlord and Tenant—Shop—Tenancy—Application for renewal of term—Reasonable rent—Whether market rent—Greater hardship—Leasehold Property (Temporary Provisions) Act, 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *ss.* 10, 12.

The landlords were the owners of two shops at Norwich. The first, 15 St. Stephens Street, had been let to the tenants for a term of 21 years, at an annual rent of £160, plus rates, the tenant being fully liable for all repairs. The second premises, 15 Magdalen Street, had been let to the tenants for a term of 21 years at a rent of £100 a year. Both terms expired on January 11, 1952. The tenants, who were grocery and provision merchants, carried on business at both addresses as grocers. They had some 70 other shops in the country. By these two applications under section 10 of the Leasehold Property (Temporary Provisions) Act, 1951, the tenants asked for an order for the grant of two new tenancies in respect of these premises. The tenants were in breach of their repairing covenants. The landlords objected to the grant of any new tenancy. The county court judge found that the landlords had a firm offer for the first premises from an intending tenant to take a 21 years' lease at a rent of £750 a year and to pay a premium of £1,500. He found the market rent of those premises for a one-year term would not be less than £700. The judge further found that the market rental of the other premises was £520.

The county court judge made an order directing that new tenancies should be granted to the tenant of the first premises at a rent of £550 for one year on the terms of the expiring lease, and of the second premises at a rent of £400 a year.

On appeal by the landlords:—

Held, (1) that it was reasonable to grant new tenancies; (2) that under section 12 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, the judge had to fix a "reasonable" rent. Such a rent might be neither the rent which the tenant had paid under his expired lease nor the market rent which the landlord had shown he could obtain, but some other figure between the two, being the rent which the judge thought reasonable in all the circumstances. The county court judge had reached a reasonable figure. The rents he had fixed paid due regard to the changed value of money but he had rightly disregarded the market rents so far as they had been inflated by the shortage of shop premises; (3) that under section 12 (3) (*e*) of the Act the onus was on the landlords to establish that they would suffer a greater hardship by the ordering of the grant of a new tenancy than the refusal so to do would impose on the tenants; (4) that once it had been decided what was a reasonable rent for the premises, it was not open to a landlord to contend that it would impose a greater hardship on him to be ordered to grant a tenancy at that rent than the refusal of an order would impose on the tenant. The mere fact that a landlord might be able, or would be able, if a tenancy at a reasonable rent were not granted, to grant a tenancy to someone else at a rent in excess of what was reasonable did not amount to hardship; (5) that having regard to the financial standing of the tenants and to the nature of the breaches of the repairing covenants, the judge rightly held that the existence of these breaches of covenant did not prevent him under section 12 (1) (*a*) from ordering the grant of new tenancies since he had come to the conclusion that the landlords would not be prejudiced as a consequence.

Semble, that the question of greater hardship prima facie arose for consideration on the question whether it was reasonable to grant a new tenancy at all and not on the question of the amount of rent.

APPEALS from Judge Carey Evans, sitting at Norwich county court.

The landlords, John Jay Kay and Harry Louis Levy, were the trustees of a charity which owned two shops in the city of Norwich, No. 15 St. Stephens Street and No. 15 Magdalen Street. The first premises had been let for a term of 21 years, which had expired on January 11, 1952, at a rent of £160 per annum, plus rates. The second premises had also been let for a term of 21 years at a rent of £100 per annum, plus rates, which also had expired on January 11, 1952. Under both leases the tenant was liable to do all repairs. Both leases had become vested in the tenants, John Kay Ld., provision merchants. The tenants had substantial assets, owning some 70 provision shops in this country. They had carried on a grocery business on both premises for many years.

By these two applications, under the Leasehold Property (Temporary Provisions) Act, 1951,[1] the tenants were asking for the grant of two new tenancies. The landlords opposed the applications. It was admitted that both premises were within the scope of the Act.

It appeared from the evidence that the landlords had a firm offer from persons anxious to take a lease of 15 St. Stephens Street to pay a premium of £1,500 and to take a lease for a 21-years' term at an annual rent of £750. The county court judge found that the rent of these premises in the open market for a term of one year only would be not less than £700. In the case of 15 Magdalen Street he found that the market rent was £520 per annum.

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[1] The Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) The provisions of this Part of "this Act shall have effect for "enabling the occupier of a shop . . . "to apply to the court for, and . . . "to obtain, the grant of a new "tenancy where apart from the next "following section the expiring ten-"ancy would come to an end imme-"diately before the date of the com-"mencement of this Act or within the "period of two years beginning with "that date. . . ."

S. 12: "(1) Subject to the pro-"visions of this section, on an "application under this Part of this "Act duly made the court may, if in "all the circumstances of the case it "appears reasonable so to do, order "that there shall be granted to the "tenant a tenancy for such period, "at such rent and on such terms and "conditions as the court in all the "circumstances thinks reasonable . . . "Provided that in fixing the rent, "terms and conditions the court shall "disregard any considerations arising "from the personal circumstances of "any of the parties. . . . (3) The "court shall not order the grant of a "new tenancy if it is satisfied—(*a*) "that the tenant has broken any of "the terms or conditions of the "expiring tenancy, and that in view "of the nature and circumstances of "the breach a new tenancy ought not "to be granted; or . . . (*e*) that "having regard to all the circum-"stances of the case greater hardship "would be caused by ordering the "grant of a new tenancy than by "refusing to do so."

It appeared that the tenants' average net yearly profits in the case of their shop at No. 15 St. Stephens Street had been £350 for the past three years when the rent was £160, and their profits in respect of the business at No. 15 Magdalen Street over the past three years had averaged £435 with a rent of £100.

Schedules of dilapidations had been served on the tenants and the judge found that they were in breach of their repairing covenants. The tenants had, however, offered an undertaking to get the more urgent repairs done forthwith.

The judge made an order directing the grant of a new tenancy of No. 15 St. Stephens Street at a rent of £550 for one year, and a grant of a new tenancy of No. 15 Magdalen Street at a rent of £400 for one year, both leases to be otherwise in the terms of the expired leases. In the course of his judgment he said: "The conclusion I have reached is that in measuring the tenants' "hardship I must not exclude from my consideration that these "are 'Temporary Provisions' as appears in the title of the Act, "intended to be replaced by permanent legislation dealing with "the rights of shop tenants to some degree of security of tenure, "and that while I cannot tell what the permanent provisions "will be, it would be a considerable hardship to the tenants not "to have protection over the interim period, so as to enable them "to take advantage of any more permanent legislation that may "follow these temporary provisions. Looking at the tenants' "hardship in that way I am not satisfied that greater hardship "would arise to the landlords by my granting a new tenancy. "They will lose for a year or two the rent which they could "obtain over and above what is reasonable in all the circum"stances; this should not be regarded as very great hardship. "Thereafter their rights may be affected by more permanent "legislation; if not, there is no real reason to think that they "should not be able to obtain a lease comparable to one they "have now been offered."

The landlords appealed.

Charles Lawson for the landlords. The Leasehold Property (Temporary Provisions) Act, 1951, does not confer any right on a tenant to the grant of a new tenancy. It is submitted that a new tenancy should not have been granted to these tenants. If a lease is granted to them at the rent directed by the county court judge, they will be making a trading loss. The test laid down in section 12 is whether it is "reasonable" to grant a tenancy. It is not reasonable to do so here where the result of granting a tenancy will be that the tenants will make a trading loss and the landlords will get substantially less than the market rent.

If it were reasonable to order the grant of new tenancies to these tenants, then section 12 (1) requires that the terms of the new tenancy shall be "reasonable." It is submitted that the rent payable should in each case have been the rent which the judge found to be the market rent, which is the reasonable rent: *Cresswell* v. *Hodgson*.[2] Further it is submitted that under section 12 (3) (*e*) the court is not to order the grant of a new tenancy where greater hardship would be caused by the order than by refusing it. It is submitted that on the figures it is clear that the greater hardship will be suffered by the landlords. Further, the tenants are in breach of their repairing covenants, and, having regard to the provisions of section 12 (3) (*a*), on this ground also the judge should have refused to order the grant of a new tenancy.

With regard to the costs, since the tenants are being granted an indulgence it is submitted that in any event they should pay all the costs of the application below and in the Court of Appeal.

Jack Hamawi for the tenants. It is submitted that what is a "reasonable rent" for the purposes of section 12 (1) of the Act of 1951 is a matter within the discretion of the county court judge. He found a rent between the old rent fixed in 1931 and the market rent of today swollen by scarcity value. The Act does not lay down any standard for fixing the rent. It is left to the discretion of the judge, and his decision should stand unless he has clearly not applied the right tests.

With regard to the question of greater hardship: it is submitted that the fact that the landlord is ordered to grant a tenancy at a rent less than the market rent is not of itself evidence of greater hardship. The Act of 1951 is a temporary measure. The landlords, to establish hardship, should have shown that the loss resulting from the reduced rent did in fact cause hardship to the charity they represent. That they have not done. The only hardship the landlords have proved is that they will not receive a rent in excess of what the judge has found to be the reasonable rent. The judge heard all the evidence, and it is submitted that he came to a right conclusion as to what is a reasonable rent.

Charles Lawson in reply. It is not agreed that this is a matter for the judge's discretion. A judge cannot fix a rent other than a rent which the evidence shows as reasonable. The reasonable rent is the market rent. The reasonableness of the rent cannot depend on the circumstances of the parties. Evidence to show their financial circumstances, it is submitted, would be inadmissible.

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[2] [1951] 1 T.L.R. 414.

EVERSHED M.R., having stated the facts, continued:—I will turn at once to the relevant terms of the Leasehold Property (Temporary Provisions) Act, 1951. Its long title is "An Act to "make temporary provision for the protection of occupiers of "residential property against the coming to an end of long leases, "and for"—and the word "for" relates back to the words "temporary provision"—"and for the renewal of tenancies of "shops; and for purposes connected with the matters aforesaid." It is in Part I of the Act that are found provisions dealing with the first matter mentioned, namely, protection of occupiers of residential property against the coming to an end of long leases. There are powers to prolong the occupation of such residential property, and in those cases it is also provided that the rents which formerly were being paid under the leases should during the temporary provision in question be, as it has been said, "frozen"; that is to say, any extension should be at the same rent as previously prevailed. As regards shops, they are dealt with in Part II; and there is at once to be noticed this distinction, that if the power given is exercised and the tenancies are renewed, then the rent is not frozen; it is not maintained at the rent previously payable, but has to be fixed according to the provisions of section 12.

The power to apply for the grant of a new tenancy is contained in section 10, which provides: "(1) The provisions of this Part "of this Act shall have effect for enabling the occupier of a "shop . . . to apply to the court for, and subject to the "provisions of this Act to obtain, the grant of a new tenancy" —I observe that the subsection does not speak in fact of a "renewal"—"where apart from the next following section the "expiring tenancy would come to an end," etc. By section 12 (1): "Subject to the provisions of this section, on an applica-"tion under this Part of this Act duly made the court may, if "in all the circumstances of the case it appears reasonable so to "do, order that there shall be granted to the tenant a tenancy "for such period,"—and I interpose that by the next subsection that period is limited so as not to exceed 12 months—"at such "rent and on such terms and conditions as the court in all the "circumstances thinks reasonable, and thereafter the parties "shall be deemed to have entered into a lease of the shop," etc., on those terms. Then there is a proviso "that in fixing the "rent, terms and conditions the court shall disregard any con-"siderations arising from the personal circumstances of any of "the parties." Subsection (2) deals with the duration of the tenancy. Subsection (3) then adds a limitation—a restriction—on the power previously given, for it provides that "The court "shall not order the grant of a new tenancy if it is satisfied— "(*a*) that the tenant has broken any of the terms or conditions "of the expiring tenancy, and that in view of the nature and "circumstances of the breach a new tenancy ought not to be "granted; or"—and then I can pass over paragraphs (*b*), (*c*) and (*d*), which are irrelevant, and go to paragraph (*e*): "that "having regard to all the circumstances of the case greater hard-"ship would be caused by ordering the grant of a new tenancy "than by refusing to do so."

Mr. Lawson, in his vigorous presentation of the case for the landlords, has drawn attention to the repetitive use of the standard of reasonableness. In the first subsection it occurs twice. First, it is the condition on which the court orders the grant of a tenancy. Second, it is the standard whereby the rent, terms and conditions are arrived at if the court determines it to be reasonable to grant a tenancy at all. The conception of the reasonable man and the standard of reasonableness have for centuries been enshrined in our common law; but the conception of leaving it to a judge to decide whether it is reasonable to make particular orders, and, if so, upon what terms, has in recent years been introduced into our statute law; and everybody who has had any experience in these matters knows that the standard of reasonableness, as a condition the satisfaction of which is required to justify the making of an order, has for years been a particular feature of the rent restriction legislation.

It is convenient to recall at once the language of Lord Greene M.R. in *Cumming* v. *Danson*[3] in reference to the Rent Acts. There the question was what were the circumstances which a judge should consider in deciding whether it is reasonable to make an order for possession. "The duty of the judge," he said, "is to take into account all relevant circumstances as they exist "at the date of the hearing. That he must do in what I venture "to call a broad, common-sense way as a man of the world, and

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[3] (1943) 112 L.J.K.B. 145, 147.

"come to his conclusion, giving such weight as he thinks right "to the various factors in the situation. Some factors may have "little or no weight, others may be decisive."

I conceive that when Parliament again introduced this conception of the standard of reasonableness, it intended to impose on the judge a corresponding duty, so that in deciding whether it was reasonable to grant a tenancy the judge—and I follow the same language—"is to take into account all relevant circum-"stances as they exist at the date of the hearing," and would have to exercise his powers in a "broad, common-sense way as "a man of the world, and come to his conclusion, giving such "weight as he thinks right to the various factors in the "situation." But that exegesis does not, perhaps, greatly help to advance the solution of the present case; nor do I think it advances the matter very much to say that that which is reasonable is at least that which is not unreasonable.

The question which has to be decided here is whether the judge in the court below applied the right test, directed his mind aright in concluding, first, that it was reasonable to grant a tenancy, and, second, that it was reasonable to do so on the terms, inter alia, that the rent which should be paid for 15 St. Stephens Street should be £550 per annum, and the rent which should be paid for 15 Magdalen Street should be £400 per annum. It is upon the second matter, namely, whether the rents fixed were reasonable, that the argument mainly turned. I do not understand Mr. Lawson to have contended, at any rate with any strenuousness, that it was not in this case reasonable to grant a tenancy at all on any terms, or in any circumstances.

I think, as did the judge, that some significance is rightly attached to the language of the short and the long titles to the Act, as indicating the kind of thing to which Parliament was directing this remedial measure. I say "remedial measure," meaning that the Act was passed in order to remedy a defect in the conditions to which it applies. Prima facie, some derogation from the rights of a landlord to deal with his property as he will must necessarily be involved. If power is given to grant, on the tenant's application, a new tenancy, it presupposes that the parties have not themselves agreed that this should happen; the court is therefore invited to make an order, so far as the landlord is concerned, in invitum. Second, I think that some importance does attach to the phrase "temporary provision." In the context in which it appears in the long title, the phrase indicates, in my view, that Parliament intended, on whatever should be found to be reasonable terms, that tenants should be protected for a short period in their existing rights of occupation; that those rights should be extended to a limited extent. The suggestion has been made that light might be thrown upon the matter by considering a report made by a committee before this Act was passed, but it does not seem to me that we can usefully, or should legitimately, look at any such report. We must find the intent of Parliament from the language of the Act itself.

One further general remark (which I think serves to emphasize what I have already said) is this: Under the familiar provisions of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I, para. (*h*), in certain circumstances the court is directed not to make the order claimed if, having regard to all the circumstances, the court is satisfied that it would cause greater hardship to make the order than not to do so, and the onus in such a case has been held to be on the tenant. In this case, as Mr. Lawson observed, the position is reversed by the import of the language of subsection (3) (*e*), whereby it is for the landlord to show, if the other conditions are satisfied, that the making of an order extending the tenant's right of occupation would cause to the landlord greater hardship than would be caused to the tenant if the order were not made.

I return to the two questions arising under section 12 (1). There are, as I think, two distinct questions which the court has to decide: First, is it reasonable to grant a tenancy at all? Second, if it is reasonable to grant a tenancy, what are the proper terms that it should contain—putting it in another way, what would be the reasonable rent and other terms and conditions? The third question which arises under subsection (3) is again distinct (and I think it is useful to treat all three questions distinctly), though I am far from saying that they may not well overlap, and that considerations which are relevant in concluding one question may not also be relevant, with or without other considerations, in concluding another.

I have referred to the conception of "reasonableness," and he would indeed be a bold judge who tried to formulate with precision the significance that the word implies. One is inevitably, sooner or later, thrown back upon generalities of the kind I have already quoted from Lord Greene M.R. This much must be clear: the standard is that which is regarded as reasonable by the judge who tries the case, and which is or may be something distinct from standards which may be found to be appropriate by applying other tests. Let me take the second question, that of

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rent, and try to illustrate the point in regard to that. As was apparent in this case, the landlords here could obtain in respect of 15 St. Stephens Street a tenant willing to pay for a 21-year term a rent of £750 and a premium of £1,500, and that might be said, with some show of justice, to be the present market value of the premises. The phrase "economic rent" has been used during the argument, but I prefer to avoid it, since the phrase has, in some contexts, and to economists, as I believe, a particular and technical significance. The market value of certain premises is one thing, and as I read this Act it seems to me that the "reasonable" rent may be something different. The reasonable rent is arrived at by applying the subjective test of what the judge thinks is right and fair, as distinct, for example, from the objective test of what the evidence shows is the market value.

In this case the facts as regards rent were these: that before the lease expired (and I will confine myself for the moment to St. Stephens Street) the tenants had been paying a rent of £160. That figure had been fixed 21 years before, and the tenants, as the evidence showed, had suggested that they should be granted a renewal or a fresh tenancy for a short period at that rent, or something very like it. On the other hand, the landlords were saying that, since the market value now was £750 plus, the standard of reasonableness would only be satisfied by reference to that fact. The judge arrived at the figure of £550. I have strayed a little into the second point from the first, and done so for the purpose of illustrating what I was trying to make clear about the use of the word "reasonable." Obviously, the judge must decide the question in the light of the evidence before him. I am so far confining myself to saying that, as I construe the Act, if the evidence justifies it, a judge may conclude that the reasonable rent is a figure which is neither the rent, on the one hand, which the tenant previously paid, nor the market value rent which the landlord has shown that he is able to obtain; but is some other figure in between the rent hitherto payable and the rent in fact obtainable, being the rent which the judge thinks is reasonable in all the circumstances of the case. I think (though this is another generality) that the question is largely what one might call "a jury point." When all the evidence has been given and attention has been directed to the right considerations, the exact quantification must be arrived at in the same way, for example, that a jury fixes some figure when it has to assess damages.

I must go back and dispose of the first question—whether it is reasonable here to grant a tenancy at all. I propose to deal with it very briefly because, I do not think Mr. Lawson has ever suggested that it would be unreasonable on any terms to grant the tenants tenancy of those premises. Indeed, having said that, and the judge having so found, I can pass on, repeating only that here there is on one side a company which has carried on its business on these premises for 21 years, and, on the other, landowners owning this property as an investment, not themselves seeking to carry on a business or desiring the premises for their own occupation, or anything of that kind. I therefore come again to the second point, which turns on this matter of rent. The evidence—and I am confining myself still to St. Stephens Street—I have already mentioned shows that the market value for renting was £750 or more. The finding of the judge upon that matter is clear, and, I think, is not susceptible of challenge. "I am satisfied," he said, "that the rent obtainable in the open "market, even for a year only, would not be less than £700." The judge also states a little further on that, in his judgment, it is unreal and wrong to suggest, as the tenant suggested, that the reasonable rent was the existing rent of £160, for the obvious reason that a rent fixed in 1931 was a rent fixed in relation to economic circumstances which, as all the world knows, have very substantially changed. The judge drew attention also to the distinction between Part I and Part II of the Act as showing that it was not the intention of Parliament that the rent should be frozen—that the existing rent should be taken as being a reasonable rent. Then, in arriving at his £550, the learned judge said this: "I cannot think it is reasonable that landlords "who like the rest of us have to meet inflated prices for every"thing which they buy should be restricted to a 1931 rent for "their property"—and so far I agree—"though this, of course, "is the fate of landlords of many rent controlled dwelling-houses, "but I have yet to hear or read any fair argument that this is "reasonable." I venture to dissociate myself with that last sentence as tending to criticize the policy of Parliament. In certain circumstances it may be made clear that, in the view of Parliament, it is reasonable that a landlord should be so restricted, or at least unreasonable that he should advance the rent he is able to charge beyond some level at some previous date. But the sentence does not, I think, go to the root of the reasoning which the judge then proceeds to adopt, for he goes on: "On "the other hand, I think that it is not reasonable in making "temporary arrangements pending new legislation that the whole "burden of inflation of shop rents should be automatically passed "on to the tenant. Where to find a reasonable figure between "these two extremes may be a problem of the greatest "difficulty. But, in this case, I have the evidence of the tenants' "valuer, who said that in his judgment and with his experience "£600 would be a 'fair rent' for a 21 year lease. Presumably "a 'fair rent' means a reasonable rent. True, he thought that "for a new tenant taking for one year only a fair figure would be "very much less; I have already given my reasons for rejecting "this view, though perhaps the 'fair rent' for a year might be a "little below"—that is the rent—"for a term of years. I reach "the conclusion that £550 would be a fair rent in all the circumstances for a new tenancy in favour of the sitting tenant for "one year, with the very indefinite prospect of some further "security arising from future legislation."

In my judgment, the judge has not in those passages misdirected himself in any material respect. He has placed, perhaps, a little more weight than I might have done on the prospect of new legislation giving some unspecified benefit to the sitting tenant, though I think he is entitled, and I have already made the point, to rely on the terms of the Act, and on the titles in particular, as showing that some temporary relief from eviction was beyond doubt in contemplation. The evidence before the court, and in particular the evidence of the revaluation for rating purposes in 1950, seems to me sufficient to justify the view that the figure of £750 is one that is derived, not merely from the increase in general costs or the decrease in the value of money (whichever way you look at it) but is a figure further inflated by the particular, and, one hopes, temporary circumstance of shortage of this sort of property; in other words, though £750 per annum is the market rent, the market figure is one inflated by the particular circumstance of shortage. The judge has, and I think rightly, said that in so far as the figure has been inflated by that circumstance, it becomes an unreasonable figure; or, at least, that it is unreasonable to impose on the tenant the obligation of having to pay that inflated sum. I think the judge is, therefore, deliberately arriving at a figure which pays due regard to the change in the value of money and to economic conditions generally, and so achieves a figure of £550 as the figure which he regards as reasonable; or (reverting again to my previous illustration of the jury question) as being the figure which, bearing all these matters in mind, a jury would think did justice in all the circumstances to the tenant and the landlord. I have, I hope, sufficiently given reasons for saying that the actual sum of £550 is not one which this court should proceed to vary by reducing it by some small amount, or adding some small amount to it. If the considerations taken into account are correct (as I think that they are), the actual figure, unless we should think it based on an entirely erroneous estimate, is not one with which the Court of Appeal would ever interfere.

I have answered the first two questions which the section poses. There still remains the matter of greater hardship, and it is Mr. Lawson's argument that, even though the first two matters are disposed of, still the granting of this tenancy on these terms would in the circumstances impose greater hardship upon the landlords than the refusal so to do would impose upon the tenants. I have already said that the onus is on the landlords, and the conclusion that the judge draws is that they have, in truth, failed to satisfy him about it. In my judgment, once it has been decided that £X is a reasonable rent and that it is reasonable to grant a tenancy at £X per annum—and I assume, though nothing turns on it, that the other conditions are also reasonable—it no longer is open for the landlords to say that the result is to impose greater hardship on them than the refusal of the order would on the tenants by reference merely to the quantum, "£X." In other words, I do not think that the landlords can now say that since £X, that is £550, means £200 less to the landlords, that fact itself involves and establishes greater hardship, all other things being equal. I refrain deliberately from trying to say what matters might be, or should be, properly considered under the title of greater hardship. I am not saying that financial considerations must be wholly excluded. But I do say that, having determined on the reasonableness of the £550, it cannot then be said on the landlords' side that that sum of itself, and being less than £750, creates "greater hardship" for the landlords.

There are, however, other matters which Mr. Lawson has prayed in aid, and one matter has been this: If you examine the figures of the business done on these premises you will see that if the rent be raised for this year, or possibly two years, to £550, the inevitable result must be that the tenants will lose money in respect of their trading operation on these premises. As a matter of evidence, I am not satisfied that that is a conclusion which must be drawn. It is only true, if you assume that their receipts and their other expenses remain unaltered, and that the only difference (as compared with the previous year) in their profit and loss account is an added sum of about £400 to rent. On that footing it would be true that, in respect of these premises, the tenants would not make a profit, and, indeed, they would make a loss; but I do not think that a court ought to assume that this very substantial business, with its 71 shops, is not capable of so adjusting its affairs to meet an increase of rent of this character, nor ought the court to assume that even though, for a period, some loss was incurred in respect of this shop, that would be disadvantageous for the tenants' business as a whole. Those are matters which, as it seems to me, are properly left prima facie, to those who manage the business itself. I therefore do not think that that circumstance can be usefully added to the matter of the difference between £750 and £550 so as to assist Mr. Lawson to say that he has satisfied the onus thrown on him by section 12 (3) (*e*).

I think that I have now covered the matter of greater hardship, and there remains only the question (which I have left till last though perhaps logically I should have dealt with it first) under section 12 (3) (*a*) that the tenants have broken terms and conditions of the previous leases. I have left the matter till last, because it needs a reference to the further evidence. I am still confining myself to St. Stephens Street. In July, 1951, a schedule of dilapidations, which extended over many pages and was embraced under no fewer than 127 heads, was served upon the tenants. The judge found that there had been breaches of the repairing covenant. A reference to para. (*a*) in subsection (3) shows that that of itself does not suffice, because a court must also be satisfied, in view of the nature and circumstances of the breach, that a new tenancy ought not to be granted. Again I refrain from attempting any exhaustive exposition of the significance of that phrase, but plainly the second half of the paragraph involves the judge in the duty of considering whether, if the tenancy is extended as suggested, the breach is such as will really prejudice the proper interests of the landlord. In regard to that the judge goes on to say: "But I have decided "that I cannot hold that in view of the nature and circumstances "of the breach a new tenancy ought not to be granted"; and then he proceeds to give his reasons, and I think that they are satisfactory reasons. "The tenants" (he proceeds) "are a "company with substantial assets but I see no reason to think "that the landlords would be in any way prejudiced by the "granting of a temporary new tenancy in so far as concerns "their prospects of having the necessary repairs done, or payment "on account of dilapidations made in due course; and I bear "in mind the tenants' undertaking at the hearing to get the "most urgent repairs dealt with forthwith." It is not suggested that the premises had got into a disreputable condition; indeed, the attractive offers which other persons apparently made for a lease of them negatived, I should have thought, such a view. I think the judge rightly concluded that, having regard to the extent of the business of the tenants, and taking into account that they had undertaken forthwith to do some urgent repairs, the existence of these breaches ought not to prevent him from making an order, and he did not think, as a ground for that conclusion, that the landlords would suffer prejudice or damage as a consequence. The result is that the restrictions imposed by subsection (3) were not shown to be satisfied, and I think the reasoning of the judge for not being so satisfied was correct. The whole question in the final analysis turns on the quantum of rent. I think in the light of the evidence the judge rightly concluded (or, at any rate, he cannot be held to have wrongly concluded) that the figure of £550 was the reasonable sum payable for rent. That disposes of St. Stephens Street, Norwich.

As regards Magdalen Street, Norwich, in all material respects the case seems to be in pari materia. The old rent was in that case £100, and the figure which the judge determined upon was £400. Again it was shown that a higher figure, in this case £520, was what he called the new market rent; but proceeding by similar stages and upon a similar basis of fact and reasoning, the judge arrived at the middle figure of £400, in this case nearer the upper limit than the lower. There was again a schedule of dilapidations, and the judge on similar grounds has, I think rightly, rejected those breaches of covenant to repair as disabling him from granting a tenancy under subsection (3) (*a*). On similar grounds also he rejected, and I think rightly rejected, the case made under subsection (3) (*e*). Indeed, the two cases have not been treated by Mr. Lawson as being in any material respect different, and what I have said, therefore, as to St. Stephens Street is, mutatis mutandis, applicable to Magdalen Street.

As regards the question of costs, these are in the discretion of the judge, and I can find no reason for saying that he exercised that discretion wrongly.

I think, therefore, that the appeals should be dismissed.

JENKINS L.J. I agree. Under section 12 (1) and (2) of the Act of 1951 two questions arise for the consideration of the court. The first is whether, in all the circumstances of the case, it would be reasonable to order the grant to the tenant of a tenancy for such period not exceeding one year at such rent and on such terms and conditions as the court, in all the circumstances of the case, thinks reasonable. If that question is answered in the affirmative, but not otherwise, then the further question arises: For what period, at what rent and on what terms and conditions, would it in all the circumstances be reasonable to order the tenancy to be granted? The judge did not, I think, in terms answer the first question, that omission presumably being accounted for by the circumstance that neither party appears to have contended, or at all events neither party appears seriously to have contended, that this was a case in which it would not, in all the circumstances, be reasonable to order the grant of a tenancy of some sort. It is true that the landlord raised the point that under subsection (3) (*a*) there was a bar to the grant of a new tenancy, but apart from that special point, it does not seem to have been suggested that, in all the circumstances it would not be reasonable for a tenancy of some sort to be granted.

Subsection (3) sets out five cases in which an order for the grant of a new tenancy is not to be made. "The court shall not "order the grant of a new tenancy if it is satisfied," and then paragraph (*a*) deals with the case where the tenant has broken any of the terms and conditions of the expiring tenancy and the court is satisfied "that in view of the nature and circumstances "of the breach a new tenancy ought not to be granted." Breaches of repairing covenants were relied on as bringing this provision into operation in the present case. The judge held that in the circumstances these breaches should not be regarded as a bar to an order for the grant of a new tenancy. I agree with my Lord that the judge came to a right conclusion as to that matter, and that his decision upon it should not be disturbed.

The other cases which operate as a bar to the grant of a new tenancy, those in (*b*), (*c*), (*d*) and (*e*) of subsection (3), are, first (*b*), the case in which "the landlord has offered to afford "to the tenant, on terms and conditions which in the opinion of "the court are reasonable, alternative accommodation which, in "the opinion of the court, is suitable for the purposes of the "tenant's business." The use in that sub-paragraph of the

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words "terms and conditions which in the opinion of the court "are reasonable" is, I think, not without significance on the second question. It is to be observed that in the case under paragraph (*b*) it would, prima facie, not be reasonable to order the grant of any tenancy of the old premises on any terms whatever in view of the offer of suitable alternative accommodation, and presumably that is why this circumstance was made a positive bar to the order for the grant of a new tenancy of the old premises. So under (*c*), which is the next one, the case in which "the landlord reasonably requires possession in order that "the premises the subject of the expiring tenancy, or a substantial "part of those premises, may be demolished or reconstructed," any project of that sort on the part of the landlord would of course be defeated by the grant to the tenant of any new tenancy whatever of the old premises. Then (*d*) is the case "where there "subsists in the premises an interest belonging to a public authority," and the court is satisfied "that in the public interest a "new tenancy ought not to be granted," that is, a new tenancy ought not to be granted at all. It is not and could not be suggested that sub-paragraphs (*b*), (*c*) or (*d*) have any application to the present case. Finally (*e*) is the greater hardship provision which has been much discussed in these appeals. If the court is satisfied "that having regard to all the circumstances of the "case greater hardship would be caused by ordering the grant "of a new tenancy than by refusing to do so." That provision seems to me to mean this, that a new tenancy is not to be granted if it is shown that the order granting a new tenancy on any terms would cause greater hardship to the landlords than refusal to do so would cause to the tenant. I say "on any terms"; by that I mean a case in which the mere grant of a new tenancy whatever its terms would cause greater hardship. I think that sub-paragraph (*e*) is primarily directed to the kind of case not specifically covered by the earlier provisions of subsection (3), where the landlord has in mind some project with respect to the premises, or requires the premises for some purpose or scheme of disposal, for which vacant possession is essential. For example, in the present case, it will be remembered that the landlords relied upon a firm offer they had got from a prospective tenant to take the St. Stephens Street premises on a 21-year lease at a rent of £750 a year, and a premium of £1,500. If the landlords had been able to show that this offer was an extraordinarily munificent offer at an outside price which was never likely to be repeated, then I think they might have gone some way towards making out a case of hardship under subsection (3) (*e*) by saying: "We have this "exceptional offer which will never be repeated. No lease for "one year on any terms could possibly compensate us for our "loss of this really exceptional bargain which would be bound to "follow if a lease for one year of the premises was granted to "the sitting tenant." But that was not the landlords' case at all; they never put forward this offer of a 21-years' lease as an exceptional bargain. They put it forward, with two or three other offers broadly speaking comparable to it, to show what the current market price or letting value of the property was. It was not sought to make out, nor was it made out, that the loss of this particular offer, which the grant of a new tenancy would entail, in itself involved such hardship on the landlords as to make it wrong, having regard to subsection (3) (*e*), to order the grant of any new tenancy at all. Accordingly, in my view, the judge was not precluded by any of the provisions of subsection (3) from ordering the grant of a new tenancy on any terms, and in all the circumstances of the case could properly come to the conclusion (as by implication at all events he clearly did) that it would be reasonable to order the grant of a new tenancy on some terms.

I now turn to the second question which occupied by far the greater part of the discussion before the judge and before us: what terms, as to rent and otherwise, would, in all the circumstances of the case, be reasonable for the purposes of the new tenancy? The court is expressly made the judge of what is reasonable—"for such period at such rent and on such terms "and conditions as the court in all the circumstances thinks "reasonable." The contest was centred entirely on the question of rent, and the issue between the parties is this: Mr. Lawson for the landlords forcibly argues that a reasonable rent is such rent as the premises will command in the open market, and no more and no less. He says the evidence before the judge established that a rent of £700 or £750 a year was in fact the rent which this property would fetch in the open market. Therefore, he says, there can be no justification for arriving at any lower figure as representing the reasonable rent, and the judge erred in fixing the figure of £550. I cannot agree that "such rent as "the court in all the circumstances thinks reasonable" means the rent which the property would fetch if put up in the open market as property to let. If that had been intended by the legislature, I cannot doubt but that the section would have been framed in very different language. The judge referred to the significant contrast presented by the proviso to section 5 (2) of the Landlord and Tenant Act, 1927. As will be remembered, that is a section under which a tenant in certain circumstances may obtain a new lease in lieu of compensation for goodwill, where he alleges adherent goodwill, as it is sometimes called, but claims that the compensation he could be awarded for it would not fully compensate him for his loss. The section deals with the terms on which a new lease is to be granted in a proper case, and as to the rent subsection (2) has this proviso: "Pro-"vided that the rent fixed by the tribunal as the rent payable "under the new tenancy shall be such rent as the tribunal may "determine to be the rent which a willing lessee other than the "tenant would agree to give and a willing lessor would agree to "accept for the premises, having regard to the terms of the "tenancy, but irrespective of any goodwill which may have "become attached to the premises by reason of the tenant or his "predecessors in title having carried on thereat a particular trade "or business." That is a proviso setting out a careful formula for arriving at a figure representing the rental value of the premises in the open market. Inevitably, if a similar calculation had been contemplated under the present Act, a similar provision would have been put in. Instead of that, the only guide given is "such rent as the court in all the circumstances thinks reason-"able." In my view that form of words was plainly used with the intention of giving the court the greatest latitude in the matter and not tying it down to the figure found to represent the actual contemporary letting value in the open market. That conclusion, as a matter of construction, seems to me to be borne out by the proviso to section 12 (1) itself: "Provided that in fixing the rent, "terms and conditions the court shall disregard any considera-"tions arising from the personal circumstances of any of the "parties." If in the body of the section "such rent as the court "thinks reasonable" had been used as meaning simply the open market rent, speaking for myself I cannot see what room this proviso would have in the section; for how could personal circumstances of either of the parties have any bearing on the question of open market rental?

Further support, I think, is to be found in the reference I have already noted in subsection (3), paragraph (*b*), to the "terms "and conditions which in the opinion of the court are reasonable" in relation to alternative accommodation. I think it impossible to hold that the court would be obliged to find terms and conditions on which alternative accommodation was offered to be reasonable, simply because it could be demonstrated that the alternative accommodation would in the open market command the rent which the landlord was asking the tenant for it. Accordingly, I think that all the indications in the section, considering the question as one of construction, are against the view that the words "at such rent as the court in all the circumstances thinks "reasonable" mean simply the open market rent ascertained by evidence as regards offers for the particular property in question or for comparable property, and by other evidence of that type.

But there is a more general reason supporting this view. It is manifest that the object of this enactment was to protect sitting tenants, as they are called, at the end of their leases from being faced with the choice between the disturbance caused by removing their business to some other premises, if they could find any, and being compelled to pay an inflated rent for their existing premises. That clearly was the state of affairs which the legislature set out to deal with, and in my view to meet that state of affairs it was necessary that the court should be given the greatest latitude in determining what would be a reasonable rent. If the only power the court had was to ascertain and fix the open market rent as the reasonable rent to be paid under a new tenancy, plainly this legislation, so far as it is concerned with shop tenants, would be in a great measure defeated, because the whole difficulty which has to be met is that, in conditions of scarcity, the open market value may be forced up to a point which does exceed all reason; and it is essential in order to make legislation of this kind effective that the tribunal which is to fix the rent should be able to discount contemporary open market values to the extent necessary in its opinion to arrive at a fair result.

The judge, as I have said, arrived at a figure in the case of St. Stephens Street of £550, and he did that after coming to the conclusion, on all the evidence, that the rent obtainable in the open market, even for a year only, would be not less than £700. He justified his reduction to £550 in this way. "But, say the "tenants, in my judgment quite rightly, you are not asked to "ascertain the 'open market' rent in the face of a scarcity and "inflation; the Act could easily have so provided had it been the "intention of Parliament to follow the basis of assessment in "the 1927 Act." He then discussed the extreme views taken

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by the two parties, the tenants saying the existing rent was right, the landlords saying the current market value was right; and he went on: "Where to find a reasonable figure between these two "extremes may be a problem of the greatest difficulty. But, in "this case, I have the evidence of the tenant's valuer, who said "that in his judgment and with his experience £600 would be "a 'fair rent' for a 21-year lease. Presumably a 'fair rent' "means a reasonable rent. True he thought that for a new "tenant taking for one year only a fair figure would be very much "less. I have already given my reasons for rejecting this view, "though perhaps the 'fair' rent for a year might be a little below "that, for a term of years." Then he says: "I reach the con-"clusion that £550 would be a fair rent in all the circumstances "for a new tenancy in favour of the sitting tenant for one year, "with the very indefinite prospect of some further security arising "from future legislation." The judge came to that conclusion on the principle, with which I entirely agree, as I have said, that the court is not asked to ascertain the open market rent in the face of scarcity and inflation, but is required to form an opinion as to the reasonable rent. The judge, therefore, was under no misapprehension as to the result at which he should arrive, and he arrived at his result after hearing evidence from both sides as regards the rents which comparable properties in the neighbourhood had been fetching, or might be expected to fetch, and the rents which these premises might be expected to fetch. Having heard all the evidence and having applied himself, as I think, to the right question, he came to the conclusion that £550 was the proper rent and, in my view, it would be wholly wrong for this court to disturb his decision.

I should perhaps say a further word on the question of greater hardship. That, it will be remembered, is dealt with in section 12 (3) (*e*). An argument on greater hardship was raised by Mr. Lawson for the landlords at a later stage than, prima facie, I should have thought would be, generally speaking, appropriate. As I have said, I think, prima facie, the point at which greater hardship comes into the calculation is the stage at which the court is considering whether it would be reasonable in all the circumstances to grant a new tenancy at all. Mr. Lawson sought, however, to make use of the greater hardship provision in this way. He said that if a lease is granted at £550 a year, the tenants on the current results of their trading will make a loss in carrying on their business on these premises; therefore, they would lose nothing if a new tenancy were refused. On the other hand, the landlord will suffer a substantial hardship inasmuch as if the new tenancy is granted at £550 per annum they will lose £200 a year in rent, not to mention any premium they might obtain, such as the premium for £1,500 offered for a lease for 21 years. Therefore, he says, purely as a financial calculation, greater hardship would be caused to the landlords by ordering this tenancy to be granted than would be caused to the tenants by refusing to do so. The judge rejected that contention and, in my view, rightly; but in doing so he gave more weight than I myself would have been disposed to do to the possible benefit that the tenants might gain from future legislation in the event of their being successful in obtaining a new tenancy under the Act of 1951. Those considerations seem to me to be too problematical and speculative to be deserving of any great weight. The matter which influences me in rejecting the landlords' argument on greater hardship is this: the rent fixed by the judge is, ex hypothesi, the reasonable rent. The hardship complained of is that if the tenancy was not granted the landlords would be able to let to somebody else at a rent greater than the reasonable rent; and it is said that this amounts to a hardship within the meaning of the Act. For my part I cannot agree that the mere fact that a landlord might be able, or would be able, if a tenancy at a reasonable rent was not granted, to grant a tenancy to somebody else at a rent in excess of what was reasonable, amounts to hardship for this purpose. I say "the mere fact" advisedly, for I wish to lay down no general rule to embarrass any tribunal on any future occasion when similar questions may arise with reference to landlords, who are, either on their own account or acting as trustees for beneficiaries, able to show that there is some real financial stringency or emergency arising in their case which would make the operation of this section work some hardship upon them.

I think the only other matter is the matter of costs. The judge made no order as to costs, and in my view his exercise of discretion in that way certainly ought not to be disturbed in this court.

There is no distinction in principle between these two cases. I have been discussing the St. Stephens Street case. I think the same result follows in the Magdalen Street case. Accordingly I agree with my Lord that both these appeals fail and should be dismissed.

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Hodson L.J. I also agree. The county court judge exercised his discretion in each of these cases in granting the new leases on terms which he fixed as reasonable, and I do not think that he took into account anything which he ought not to have taken into account, or left out of account any relevant circumstance. The only reason that I add anything at all to what my Lords have said is because while taking, as they do, the view that it is undesirable to generalize as to what may or may not be hardship in any given case, I would like to guard myself against being thought to take the view that the mere existence of a financial loss is to be taken to be hardship although financial loss may, of course, produce hardship. Mr. Lawson, who according to the county court judge pressed section 12 (3) (*e*) strongly and rested his strongest argument upon it, maintained that there was a hardship to the landlords in losing a firm offer of £1,500 premium and a 21-year lease at £750. I think for myself that "hardship" really involves something more than the mere loss of money. To my mind it indicates something much nearer the imperilment of livelihood, and the legislature must have had in mind an example, such as my Lord gave, of a landlord who wanted the premises for himself in order to carry on a business there for himself. In the particular circumstances of this case, if the comparison is between £750 for 21 years plus a premium, and what is, on the other hand, in the opinion of the county court judge, a reasonable rent, namely, £550 a year, there seems to me to be grave danger of misapprehension if one merely looks at the balance sheet to see how the money results work out in considering what amounts to "hardship."

The other branch of the landlords' argument on this topic was a curious one indeed, because they said that the tenants have made a profit at the old rent and at the new rent they will make a loss; and therefore it is a hardship on them to grant them a tenancy. That was a matter for the tenants to decide, and not, I think, a matter upon which this court or the county court is in a better position than the tenants to express an opinion.

I agree that the appeals fail, and I also agree that there is nothing in the point that the county court judge wrongly exercised his discretion as to costs. As I understood it, Mr. Lawson put it in this way, that the tenant here is not entitled to anything except what he can get by negotiation unless he puts the Act into operation and brings the landlord to court; and, having done so, and having obtained a concession, he ought, prima facie, to bear the costs. I do not accept that contention, and apart altogether from the question of interfering with the exercise of discretion, it seems to me an entirely natural exercise of that discretion for the county court judge to have made the order which he did make.

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Appeals dismissed.

Solicitors: *Thornton, Lynne & Lawson; Hardcastle Sanders & Armitage.*

B. A. B.

DRINKWATER AND ANOTHER *v.* KIMBER.

[1950 D. 1498.]

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Jan. 22, 23, 24;
Feb. 29.

Singleton, Birkett and Morris L.JJ.

Tort — Separate tortfeasors — Contribution — Wife a passenger when husband driving vehicle—Collision with car driven by defendant —Husband and defendant both to blame—Wife awarded damages against defendant for negligence — Counterclaim by defendant against husband for proportion of that financial loss—Whether cause of action under Law Reform (Contributory Negligence) Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 28), *s.* 1 (1)—*What is "damage" under that subsection?*

A motor van driven by the male plaintiff, in which the female plaintiff, his wife, was a passenger, collided with a motor car driven by the defendant. In the subsequent action the female plaintiff claimed damages for personal injuries and the male plaintiff for loss and expense. The defendant pleaded by his counterclaim: "If, contrary to the defendant's contention, the defendant is held "to have been guilty of negligence contributing towards the "happening of the matters complained of, so that he is adjudged "to pay damages to the female plaintiff, the defendant will contend "that he has suffered damage within the meaning of section 1 of "the Law Reform (Contributory Negligence) Act, 1945, caused "partly by his own fault and partly by the fault of the male "plaintiff." The defendant paid money into court in respect of the claim of the male plaintiff which was taken out in satisfaction by him, and he remained in the action merely as defendant to the counterclaim.

The trial judge found that responsibility for the collision lay as to two-thirds on the defendant and as to one-third on the male plaintiff. He awarded the female plaintiff £405 damages for personal injuries against the defendant, who counterclaimed for one-third of that sum £135 against the male plaintiff under section 1 (1) of the Law Reform (Contributory Negligence) Act,

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1945, whilst admitting that he could not recover this sum from the male plaintiff under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, since the two plaintiffs were husband and wife:—

Held, that the cause of action claimed was not available to the defendant under section 1 (1) of the Act of 1945 and further that what the defendant claimed from the male plaintiff was not "damage" within the meaning of the subsection.

The defendant was a separate and not a joint tortfeasor. If the defendant by his counterclaim against the male plaintiff had alleged damage done to his motor car, on the judge's findings, he would have been able to recover one-third of the damage to his car. But by the counterclaim pleaded, it was not alleged that because of the male plaintiff's negligence, the defendant was caused to be negligent towards the female plaintiff nor was that proved, and so the defendant failed to establish that the male plaintiff's negligence caused the loss of which he complained. In effect, the defendant claimed to have suffered damage because he had been held liable to have caused damage. Section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945 did not bring into existence any new variety of claim. That subsection merely removed an obstacle to a claim made by a person who had suffered damage as the result in part of his own fault.

Decision of Devlin J. [1951] W.N. 496, affirmed.

APPEAL from Devlin J.[1]

On the night of June 4, 1950, a motor van driven by the plaintiff Drinkwater, in which his wife was a passenger, came into collision at a cross-roads with a Sunbeam Talbot motor-car driven by the defendant. Mr. and Mrs. Drinkwater sued Mr. Kimber, the defendant, claiming damages for negligence on the part of the defendant whereby Mrs. Drinkwater suffered personal injuries and Mr. Drinkwater suffered loss and expense.

By his defence and counterclaim the defendant denied negligence, alleged that the matters complained of were caused solely by the negligence of the male plaintiff, or in the alternative that the male plaintiff was guilty of contributory negligence.

By paragraph 6 of his counterclaim the defendant pleaded that "if, contrary to the defendant's contention, the defendant is held "to have been guilty of negligence contributing towards the "happening of the matters complained of, so that he is adjudged "to pay damages to the female plaintiff, the defendant will "contend that he has suffered damage within the meaning of "section 1 of the Law Reform (Contributory Negligence) Act,

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“1945,[2] caused partly by his own fault and partly by the fault of the male plaintiff.”

The defendant paid into court a sum of money in respect of the claim by the male plaintiff which was taken out in satisfaction, so that the male plaintiff remained in the action only as defendant to the counterclaim.

At the trial Devlin J. assessed the damages of the female plaintiff at £405 and he held that the defendant was two-thirds and the male plaintiff one-third to blame for the collision.

Counsel for the defendant contended that the male plaintiff as a joint tortfeasor being in part responsible for the collision should be ordered to contribute £135, being one-third of the damages of £405 he had been ordered to pay to the female plaintiff. He admitted that section 6 (1) (*a*) of the Act of 1935 did not remove the bar to his action at common law, since it provided that the judgment recovered against him should not be a bar “to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage,” and the male plaintiff would not have been liable to his wife in respect of the same damage because of the relationship between them of husband and wife. Counsel based his claim on section 1 (1) of the Act of 1945, claiming that he was a person who had suffered damage (namely, the amount he was ordered to pay to the female plaintiff) as the result partly of his own fault and partly of the fault of another person, and the subsection provided in express terms that a claim in respect of that damage should not be defeated by reason of the fault of the person suffering the damage.

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[2] The Law Reform (Contributory Negligence) Act, 1945, s. 1 (1): “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage; . . . (2) Where damages are recoverable by any person by virtue of the foregoing subsection, subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault. (3) Section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which relates to proceedings against, and contribution between joint and several tortfeasors), shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person. . . . (6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.”

S. 4: “ ‘Damage’ includes loss of life and personal injury.”

Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1): “Where damage is suffered by any person as a result of a tort (whether a crime or not)—(*a*) judgment against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. . . . (*c*) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise. . . .”

Devlin J. said that he did not think that the defendant's construction of section 1 (1) of the Act of 1945 was permissible. The scope of the Act must be considered: it was not intended to alter any substantive defence to a cause of action. If the defendant's construction of the subsection were correct it would, in effect, eliminate from section 6 (1) (*a*) of the Act of 1935 the limitation created by the phrase "who would, if sued, have been "liable as a joint tortfeasor in respect of the same damage." The inclusion of section 6 (1) (*a*) of the Act of 1935 in subsection (3) of section 1 of the Act of 1945 clinched the point. He did not think that there was any clash between subsections (1) and (3) of the Act of 1945 or that subsection (3) was superfluous. The defendant's construction depended upon reading the word "damage" in subsection (1) as meaning more than physical damage and as wide enough to include the sort of financial loss which arose when, as the result of a wrongful act, a man has to make a payment to a third party. That reading made subsection (3) at best superfluous and at worst contradictory. If the meaning of "damage" in subsection (1) were restricted to physical damage, the two subsections (1) and (3) of the Act of 1945 fell into place and were complementary. Subsection (1) gave relief only to a man who had suffered physical damage—the initial plaintiff who started the proceedings. Subsection (3) was designed to provide for the case where such a plaintiff had claimed or could claim against two defendants who sought contribution between themselves.

In the result it seemed that, if a third party injured a wife, her husband might recover all the expense to which he was put even though his wife were partly to blame: see *Mallett* v. *Dunn.*[3] By the present decision, if a third party injured a wife, even though the husband was partly to blame, the wife might recover the whole of her damage without her husband being made to contribute. There must be judgment for the female plaintiff for £405 damages and the counterclaim must be dismissed.

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[3] [1949] 2 K.B. 180.

The defendant appealed and the female plaintiff also appealed on the amount of damages awarded to her.

Patrick O'Connor and *M. McLaren* for the defendant. The counterclaim of the defendant here should not have been dismissed. The defendant is entitled to recover against the male plaintiff one-third of the damages he has been ordered to pay to the female plaintiff, by virtue of the provisions of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945. The defendant could not recover this damage under the Law Reform (Married Women and Tortfeasors) Act, 1935, as contribution, because of the words in section 6 (1) (*c*) of that Act: "Any tort-"feasor liable in respect of that damage may recover contribution "from any other tortfeasor" (but then comes the limitation) "who is, or would if sued, have been liable in respect of the "same damage . . ."; for the male plaintiff was not liable in respect of the same damage here to the female plaintiff, because she was the wife of the male plaintiff. The defendant could not, therefore, have recovered these damages—one-third of the damages he had been ordered to pay to the female plaintiff, before June 15, 1945.

The defendant's counterclaim comes expressly within the words of section 1 (1) of the Act of 1945: The defendant is a person who has suffered damage (namely, the amount he was ordered to pay to the female plaintiff) as the result partly of his own fault and partly of the fault of another person. The subsection provides in express terms that a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. Suppose that an action had been launched by the female plaintiff only against the defendant and that this had been settled for an agreed amount of damages. Subsequently the defendant could have sued the male plaintiff for that damage and recovered a portion of it: see *Mowbray* v. *Merryweather*.[4] The effect of section 1 (1) of the Act of 1945 is to lift the bar created by his contributory negligence and to allow the defendant here to bring the action set out in his counterclaim, although I concede that it may well be that the Act was not designed to give him that right. This claim would have succeeded had it been in Admiralty under the Maritime Conventions Act, 1911: *The Cairnbahn*.[5] See also *The Frankland*[6] for the rule in Admiralty before the passing of that Act. Evershed L.J. said in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.; James, Third Party* [7]: "I express the hope that "there should be and will be no divergence of principle or of the "application of principle between the Admiralty Courts and the "Common Law Courts in dealing with these matters of contributory negligence under the Acts of 1911 and 1945 respectively. "It seems to me that, broadly regarded, the intention of the "two Acts was in substance the same, so that similar principles "should apply and be applied in the same way."

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[4] [1895] 2 Q.B. 640.

[5] [1914] P. 25, 32.

[6] [1901] P. 161.

In *Price* v. *Fraser Valley Milk Producers' Association*,[8] in British Columbia, it was expressly decided that the decision in *The Cairnbahn* [5] is authoritative on the interpretation of the Contributory Negligence Act of that province: the Act of 1925, c. 8. The Act now in force has an extra section expressly providing for such contribution: R.S.B.C. 1936, c. 52.

If the defendant had counterclaimed for damage to his person or his motor-car he could have recovered: see the definition of "damage" in section 4 of the Act of 1945. In *Smith* v. *Brown* [9] the court was construing the expression "damage done by any "ship," which, of course, must be confined to physical damage. There the court held that loss of life (and suggested that personal injury), occasioned by the collision of two vessels did not come within the term "damage done by any ship." This may account for the definition in section 4 of the Act of 1945 of "damage" as including loss of life and personal injury. The last question which emerges is the construction of the word "damage" in the Act of 1945: it includes financial loss. There is no reason why the court should so limit the meaning of the word as to exclude financial loss: see the observations of Viscount Simon L.C. in *Crofter Hand-Woven Harris Tweed Co. Ld.* v. *Veitch* [10] on the words "injury" and "loss." It is submitted that here the word "damage" covers physical damage, personal injury and financial loss: see Glanville Williams' work on Joint Torts and Contributory Negligence (1951), where he deals with this question at paragraph 33 on p. 117.

Section 1 (3) of the Act of 1945 only applies where there are three parties at fault and it is the result of the decision in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.; James, Third Party*.[7] Where there are only two parties at fault, subsection (3) is inapplicable.

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[5] [1914] P. 25.

[7] [1949] 2 K.B. 291, 319.

[8] [1932] 2 W.W.R. 65.

[9] (1871) L.R. 6 Q.B. 729.

[10] [1942] A.C. 435, 442.

Glyn-Jones Q.C. and *F. G. Paterson* for the male plaintiff. The case for the defendant rests on the following propositions:—

1. The defendant's liability to pay compensation to the female plaintiff for her injury was caused, at least in part, by the negligence of the male plaintiff, since that negligence contributed to cause the female plaintiff's injury.

2. The male plaintiff owed a duty of care to the defendant and the defendant has therefore a good cause of action against the male plaintiff to recover as damages for negligence the sum he has been held liable to pay to the female plaintiff.

3. Before 1945, the defendant's cause of action would have been defeated by the defence of contributory negligence, but by the Law Reform (Contributory Negligence) Act, 1945, the defendant can now succeed subject to the abatement of his claim to the extent which the court thinks just having regard to his own share of blame.

These propositions are unsound. If the parties had been joint tortfeasors, i.e., if their respective shares in the commission of a tort had been done in furtherance of a common purpose or design, the common law might have implied a promise by one to contribute to the liability of the other or to indemnify him; and an action to enforce such promise could have been based on assumpsit. Whether or not such an action is defeated by the maxim " ex turpi causa non oritur actio " depends on the circumstances of the particular case: see Bullen and Leake's Precedents of Pleading, 3rd ed., at p. 43; *Merryweather* v. *Nixan*[11] and *Burrows* v. *Rhodes*.[12]

But in this case the male plaintiff and the defendant are not joint tortfeasors, since there was no common purpose. They were guilty of separate and independent torts: see *The Koursk*.[13] That which involved the defendant in liability to the plaintiffs was his own separate and independent wrongdoing, and that wrongdoing was not a consequence of the male plaintiff's wrongful act. The defendant, therefore, fails in limine, in that he fails to prove that the male plaintiff's negligence caused the loss of which he complains.

If the defendant would have had no cause of action before the passing of the Law Reform (Contributory Negligence) Act, 1945, he has had none since, because that Act does not create a cause of action for him.

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[11] (1799) 8 Term Rep. 186.

[12] [1899] 1 Q.B. 816.

[13] [1924] P. 140.

The appellant fails also for the reason given by the trial judge, namely, that the word "damage" in section 1 of the Law Reform (Contributory Negligence) Act, 1945, does not include loss or liability to pay money. If the word "damage" in section 1 were used in a sense wide enough to include loss or liability to pay money, it presumably includes also loss of life and personal injury. Yet section 4, the definition section, expressly provides that "damage" is to include loss of life and personal injury, but does not provide that it shall include financial loss such as that which the defendant claims. Section 3 (1) of the Act of 1945 shows that the draftsman had in mind the provisions of the Maritime Conventions Act, 1911, in sections 1 and 2 of which the word "damage" is used in a context which clearly excludes "loss," "loss of life" and "personal injuries," for all four terms are used in one or other of the two sections with meanings which are mutually exclusive. *The Cairnbahn*[5] shows that liability to pay compensation falls under the heading "loss" and not under the heading "damage." The word "damage" in section 1 of the Act of 1945 is used in the sense in which it is used in section 1 of the Maritime Conventions Act, 1911, enlarged only by the definition section—section 4 of the Act of 1945. The word "damage" there does not include financial loss. [*Glasgow Corporation* v. *Robertson*[14] was referred to.]

Patrick O'Connor in reply cited *Cakebread* v. *Hopping*[15]; *Askey* v. *Golden Wine Co. Ld.*[16]; *Nance* v. *British Columbia Electric Railway Co.*[17]; and Smith's Leading Cases, 13th ed., vol. 1, at p. 449.

Cur. adv. vult.

February 29. SINGLETON L.J. The claim of the defendant is really a claim to contribution but, as such a claim cannot succeed under section 6 of the Act of 1935, the defendant seeks to achieve the same end by claiming damages against the male plaintiff and bringing into play section 1 (1) of the Act of 1945. That section does not create a right of action; it removes an obstacle. The fact that the defendant was himself negligent by virtue of that section ceased to be a bar to his succeeding to some degree against someone else who was negligent, if he proved damage. Devlin J. awarded the female plaintiff £405 damages in her action against the defendant on the ground of negligence. On the defendant's counterclaim he formed the opinion that the male plaintiff was one-third to blame and the defendant two-thirds, and he so said, but he held that the defendant could not recover on his counterclaim.

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[5] [1914] P. 25.
[14] [1936] 2 All E.R. 173.
[15] [1947] K.B. 641, 654.
[16] [1948] 2 All E.R. 35.
[17] [1951] A.C. 601, 611.

The fact that a person might in certain circumstances be liable to contribute one-third of the damages awarded does not mean that of necessity the person who pays the whole amount of damages has a right of action for damages against him. The defendant's counterclaim was that if he were adjudged guilty of negligence in the action he would contend that he had suffered damage within the meaning of section 1 of the Act of 1945 caused partly by his own fault and partly by the fault of the male plaintiff; and at the hearing the defendant asked for judgment for £135, that is, one-third of the damages he was ordered to pay to the female plaintiff.

The answer to the problem would seem to be that the defendant has not shown that he suffered damage within the meaning of section 1 of the Act of 1945. There was no proof of any damage to him or to his property in the accident; if there had been he would have been entitled to contribution in respect of it. He was subsequently found responsible in damages, and judgment was given against him for £405 for negligence. His liability arose on that judgment, and I do not think that what he claimed was damage within the meaning of section 1 of the Act of 1945. One can test this by asking when (if ever) the right of action of the defendant arose.

The purpose of section 1 was to remove the bar which stood in the way of someone who was at fault (or who was negligent). It does not extend the right to contribution. The submission on behalf of the defendant is that it does so or, at least, that it enables him to obtain as damages an amount which is equivalent to the contribution to which he would have been entitled, but for the words in section 6 (1) (*c*) of the Act of 1935, "who is, or "would if sued have been, liable in respect of the same damage." I cannot accept Mr. O'Connor's submission. Subsection (3) of section 1 of the Act of 1945, which renders applicable section 6 of the Act of 1935, is directly opposed to the construction which he puts forward. Subsection (3) of section 1 of the Act of 1945 preserves the limitation on contribution in the Act of 1935: it cannot be that that limitation is abolished inferentially by subsection (1). Further light is thrown upon the matter by an examination of subsections (2) and (4) of section 1 of the Act of 1945. It is sufficient to take the former. Where damages are recoverable by any person in a case to which subsection (1) applies, judgment is given for that amount; then under subsection (2), "the court shall find and record the total damages which would "have been recoverable if the claimant had not been at fault." Mr. O'Connor submits that judgment should be entered for the defendant for £135 damages, but if the defendant had not been negligent no damages would have been recoverable by the female plaintiff, and the court in such case would be bound to record the damages which would have been recoverable, if the defendant had not been negligent, as nil. That satisfies me that this claim to damages based upon a judgment against a defendant, and not arising directly from the accident, either is not a claim within the ambit of section 1 of the Act of 1945, or that that which is claimed is not "damage" within the meaning of that word as used in section 1 (1) of the Act of 1945.

I do not think that any help is given by the decisions in Admiralty cited to us.

In the result, I reach the same conclusion as that reached by Devlin J., though he took a narrower view of the word "damage" than I do. I realize the difficulty which arises from the definition of "damage" in section 4 of the Act of 1945, and yet I cannot see why "damage" under that Act should be read in a different way from that in which it has always been treated under section 6 of the Act of 1935.

In my opinion, the appeal should be dismissed.

The female plaintiff entered a cross-appeal on the amount of damages awarded to her. As we intimated during the hearing, that fails, and it, too, must be dismissed.

BIRKETT L.J. I agree with the judgment which has just been delivered. I have also had an opportunity of reading and considering the judgment which is about to be delivered by Morris L.J., and I agree with that judgment, too. In those circumstances I do not desire to deliver a judgment of my own.

MORRIS L.J. The female plaintiff was a passenger in a motor-van which was being driven by her husband, the male plaintiff. A collision occurred between the motor-van and a motor-car driven by defendant. The female plaintiff was hurt, and the male plaintiff was put to loss and expense. The female plaintiff sued the defendant for damages for negligence, and was awarded £405 damages. The male plaintiff also sued defendant for damages for negligence. His claim was the subject of a settlement before the hearing.

The defendant who, in defence to the female plaintiff's claim, pleaded that the collision was solely caused by the male plaintiff's negligence, and in defence to the male plaintiff's claim pleaded that the collision was solely, or partly, caused by the male plaintiff's negligence, set up a counterclaim as against the male plaintiff. It was framed in the following words: "If "(contrary to the defendant's contention) the defendant is held "to have been guilty of negligence contributing towards the "happening of the matters complained of, so that he is adjudged "to pay damages to the female plaintiff, the defendant will "contend that he has suffered damage within the meaning of "section 1 of the Law Reform (Contributory Negligence) Act, "1945, caused partly by his own fault and partly by the fault of "the male plaintiff."

The trial judge dismissed the counterclaim, and in dealing with it he held that the male plaintiff was to be blamed for the collision in the proportion of one-third, and that the defendant was to be blamed in the proportion of two-thirds. On these facts the defendant was a tortfeasor who was liable in respect of the damage suffered by the female plaintiff as a result of a tort. The opening words of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, are: "(1) Where damage is "suffered by any person as a result of a tort." The female plaintiff was such a person. The opening words of section 6 (1) (*c*) of the Act of 1935 are: "any tortfeasor liable in respect "of that damage may recover contribution." The defendant was a tortfeasor liable in respect of the female plaintiff's damage. He would, without doubt, have wished to receive a contribution from the male plaintiff of one-third of his liability. He could not, however, avail himself of the later words of section 6 (1) (*c*) —that is, the words "may recover contribution from any other "tortfeasor who is, or would if sued, have been, liable in respect "of the same damage whether as a joint tortfeasor or other-"wise." He could not do so for the reason that the male plaintiff was not liable to the female plaintiff, his wife, and could not have been sued by her.

Being unable to avail himself of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, which section would, in regard to the present facts, denote the female plaintiff as one who has suffered damage as the result of a tort, the defendant turns to section 1 of the Law Reform (Contributory Negligence) Act of 1945 and claims that he is the person who has suffered damage. In effect, he claims to have suffered damage because he has been held liable for having caused damage.

Conceding that the Act of 1945 could hardly have been designed to cover the claim that he makes against the male plaintiff, the defendant contends, nevertheless, that he can contrive to accommodate himself within the language used in the Act. Being thwarted in his not unnatural quest for contribution by the terms of the Act of 1935, he claims that the words of the Act of 1945, which was an Act passed to amend the law relating to contributory negligence, are wide enough to assist him.

In my judgment, the counterclaim rightly failed. The Act of 1945 does not give the defendant a cause of action against the male plaintiff. The Act does not purport to create any new variety of claim. The only claim which the defendant asserts by his counterclaim is in the terms which I have recited. But the reason why the defendant has been held liable to the female plaintiff is because he himself was negligent towards her and caused her damage. He has not been held liable to her because the male plaintiff was negligent towards her. Indeed, he was not a person responsible in law for the negligence of the male plaintiff. The defendant and the male plaintiff would not appear to have been joint tortfeasors. (See *The Koursk*.[13]) They were separate tortfeasors whose concurrent acts caused injury to the female plaintiff. By operation of law, once she proved negligence against the defendant, then she could recover from him the full amount of resultant damage suffered. It was no defence to the defendant, as against the female plaintiff, to say that the male plaintiff was also negligent.

If the defendant had by counterclaim against the male plaintiff made a claim in respect of some damage done to his motor-car he would have established, on the judge's findings, that the male plaintiff was negligent, and that such negligence did cause him damage. Though he would himself have been the main author of the damage he would, as a result of the Act of 1945, have been able to recover one-third of the amount of his necessary loss and expense. But in the counterclaim that was presented, though it was asserted (and rightly so) that the male plaintiff was negligent towards the defendant, it was not alleged that because of such negligence the defendant was caused to be negligent towards the female plaintiff. It is only because of his own negligence that the defendant has been held liable to the female plaintiff. That the male plaintiff's negligence towards the defendant caused the defendant to be negligent towards the female plaintiff was not alleged, and was not proved, and was not held. The defendant does not, therefore, establish any cause of action against the male plaintiff, and, in my judgment, section 1 of the Act of 1945, in dealing with the topic of contributory negligence, does not purport to bring into existence some new species of claim. That section provides that a claim is not to be defeated in one particular way, that is, by setting up the defence of contributory negligence: it does not touch the questions whether a claim exists at all, or whether a claim can be met by any other defence.

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[13] [1924] P. 140.

Apart from these considerations, the defendant does not, in my judgment, bring himself within the language of section 1 of the Act of 1945 in connexion with the claim that he makes. In regard to his liability to the female plaintiff—which is the only subject of the counterclaim—he is not a person who has suffered damage. He is a person who has caused damage. But even if it could be said that because he has been adjudged by the court to be liable to pay damages to the female plaintiff, he then comes within the words "where any person suffers damage," it would be very doubtful whether he would come within the words which follow, that is, the words "as the result partly of his own fault "and partly of the fault of any other person." The legal liability to the female plaintiff would have flowed only from his own fault. The word "fault" is defined in section 4 of the Act of 1945 as meaning "negligence, breach of statutory duty or "other act or omission which gives rise to a liability in tort or "would, apart from this Act, give rise to the defence of "contributory negligence."

In my judgment, it is not necessary to endeavour to define the word "damage" as used in the phrase in section 1 (1) of the Act of 1945 "where any person suffers damage." The Act does not define the word save to the extent that section 4 provides that "damage" "includes loss of life and personal "property." The omission further to define that word was probably for the reason that the word is one which is well understood in legal parlance as being in many cases one of the elements to be proved in establishing liability in law. A plaintiff, for example, who shows that a defendant was guilty of some negligent act or omission towards him must also show that damage resulted to the plaintiff which was not too remote a consequence of the defendant's conduct. Section 1 (1) of the Act of 1945 uses the words "a claim in respect of that damage shall not be "defeated by reason of the fault of the person suffering the "damage, but the damages recoverable in respect thereof shall "be reduced. . . ." It seems clear that the word "damage" refers to that which is suffered and for which a "claim" may be made, and for which "damages" are recoverable. All this language is quite inapt to cover the liability of the defendant to the female plaintiff. Furthermore, even if such liability could be brought within the word "damage," it is difficult to see how a "claim in respect of that damage" could be asserted, or how "damages" could be recoverable "in respect thereof," that is, damages in respect of that damage. The counterclaim only arises if and when the defendant has been held liable to the female plaintiff because he has been negligent, and the defendant could not, on any view, seek to recover from the male plaintiff the whole amount of his (the defendant's) liability to the female plaintiff.

Further exemplification of the entire inaptness of the language of section 1 (1) of the Act of 1945 to cover the allegation in the defendant's counterclaim is found by considering the terms of subsections (2) and (6). If the defendant had not been at fault and had not been liable to the female plaintiff the damages on the counterclaim would have been nil. Indeed, the counterclaim would not have arisen at all. If the counterclaim had been tried with a jury it would have been the duty of the judge to direct them that if the defendant were not at fault the damages would be nil. On the findings of the trial judge in this case the argument of the defendant involves that damages have to be "reduced" from nothing to £135, and that the court must duly record this strange phenomenon of contraction.

That is was never intended by the Act of 1945 to vary the law as to contribution as it was left by the Act of 1935 is shown by the fact that the later Act recites certain provisions of the former one without enacting any modifications or repeals. That the language used by the legislature in the Act of 1945 has undesignedly produced an unexpected result has not been established by the defendant.

On behalf of the defendant much reliance was placed on the decision of this court in *The Cairnbahn.*[18] But that decision does not advance the defendant's contentions. The steamer, the *Cairnbahn*, had come into collision with one of two hopper barges which were in tow of a tug, the *Nunthorpe*. Damage was done to the hopper, and the *Cairnbahn* sustained damage to herself. No collision occurred with the *Nunthorpe*. Two actions were brought. One was by the owners of the hopper against the owners of the *Cairnbahn*; in that action the owners of the *Nunthorpe* were afterwards added as defendants. The second action was by the owners of the *Cairnbahn* against the owners of the *Nunthorpe*. The actions were consolidated. It was held that the *Cairnbahn* and the *Nunthorpe* were equally to blame, but that no blame attached to the hopper. The hopper recovered from the *Cairnbahn* alone the whole of her claim for damages. That judgment was satisfied. The owners of the *Nunthorpe* were then ordered by the President to pay to the owners of the *Cairnbahn*: (1) One-half of the damage occasioned by the collision to the *Cairnbahn*; and (2) one-half of the damages paid by the owners of the *Cairnbahn* to the owners of the hopper. From that order of the President the owners of the *Nunthorpe* unsuccessfully appealed to this court. They contended that section 1 of the Maritime Conventions Act, 1911, regulated only the mode of apportioning a liability existing independently of the Act, and submitted that they were under no such liability.

The defendant in the present appeal seeks to argue that just as the owners of the *Cairnbahn* were entitled to recover from the owners of the *Nunthorpe* a part of what had been paid to the innocent owners of the hopper, so here the defendant should be allowed to recover from the male plaintiff a part of what has to be paid by him to the female plaintiff. But the decision in *The Cairnbahn*[18] depended upon the view formed of the effect of section 1 of the Maritime Conventions Act, 1911—the wording and scope of which differ materially from the wording and scope of section 1 of the Law Reform (Contributory Negligence) Act, 1945. Section 1 of the Act of 1911 begins with the words "(1) Where by the fault of two or more vessels, damage or loss "is caused to one or more of those vessels, to their cargoes or "freight, or to any property on board, the liability to make good "the damage or loss shall be in proportion to the degree in which

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[18] [1914] P. 25.

"each vessel was in fault. . . ." With the main point of controversy debated in *The Cairnbahn*[18] the present defendant has no concern, but he points to the fact that the payment made by the owners of the *Cairnbahn* to the owners of the hopper came within the words "damage or loss is caused to one or more of "those vessels." But the defendant can really derive no help from this circumstance, for there is an obvious material difference between the phrases "where any person suffers damage" and "damage or loss is caused to one or more of those vessels."

On further examination it would appear that the payment made by the owners of the *Cairnbahn* was within the word "loss" rather than the word "damage." No point arose in fact as to the payment being within the words of the section. In his judgment Sir Samuel Evans P. said[19]: "It was admitted "in terms by counsel for the owners of the tug *Nunthorpe* that "if the owners of the steamship were entitled to claim any "damage from them, they, the owners of the steamship, were "entitled to include in their damage or loss the amount of the "judgment obtained against them by the innocent tow." In this court the matter seems to have been regarded as coming within the word "loss." Lord Parker of Waddington said[20]: "This being so, the only remaining question is whether the sum "recovered by way of damages against the owners of the *Cairnbahn*, by the owners of the hopper barge, damaged through the "fault of the *Cairnbahn* and the *Nunthorpe*, is loss caused to "the owners of the *Cairnbahn* within the meaning of the section. "In my opinion it is." Lord Sumner, at the start of his judgment, said[21]: "The owners of the *Cairnbahn* suffered 'damage' "because their ship ran into the hopper which was in tow of "the tug *Nunthorpe*. They suffered 'loss' because the owners "of the hopper sued them for her injuries and won." Again, he said[22]: "The word 'loss' is wide enough to include that form "of pecuniary prejudice which consists in compensating third "parties for wrong done to them by the fault of persons for "whose misconduct the party prejudiced must answer." Warrington J. said[23]: "There remains the question as to the "damages paid to the owners of the hopper by the owners of "the *Cairnbahn*. I fail to see why the sum so paid should not "be properly held to come within the expression 'loss caused to

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[18] [1914] P. 25.
[19] [1914] P. 25, 28.
[20] Ibid. 31.
[21] Ibid. 32.
[22] Ibid. 33.
[23] Ibid. 38.

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" 'that vessel'—treating the word 'vessel' in this part of the " Act as used figuratively for the owners of the vessel."

I, therefore, consider that the decision in *The Cairnbahn*[24] affords no assistance to the argument of the defendant. But even if the defendant could bring his liability to the female plaintiff within the word "damage" in section 1 (1) of the Act of 1945 the counterclaim would, in my judgment, for the reasons which have been given, nevertheless fail. I concur, therefore, in the conclusion that the appeal fails, as I also do in the conclusion that the female plaintiff's cross-appeal in regard to the amount of the damages also fails.

Appeal dismissed.
Cross-appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown; R. I. Lewis & Co.*

C. G. M.

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[24] [1914] P. 25.

TRANS TRUST S.P.R.L. *v.* DANUBIAN TRADING CO. LD.

[1951 T. 507]

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Mar. 10, 11, 12, 28.
Somervell, Denning and Romer L.JJ.

Sale of Goods — Contract — Confirmed credit — Failure to provide — Repudiation of contract—Loss of profit—Measure of damages—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 50 (3).

The defendants contracted to buy from the plaintiffs a quantity of steel which the plaintiffs were to purchase from A, a Belgian company to whom the manufacturers of the metal had given an option to buy. Neither the plaintiffs, defendants, nor A, were in a position to provide the money necessary to obtain delivery of the steel. It was a term of the contract that payment by the defendants should be by cash against shipping documents from a confirmed credit to be opened at a Brussels bank, in favour of A, by an American corporation to whom the defendants had in turn contracted to sell the steel. The defendants failed to procure the opening of the credit and eventually repudiated the contract. The plaintiffs thereupon claimed from the defendants, as damages for breach of contract, the profit which they would have made if the transaction had been carried through. They also claimed to be indemnified by the defendants against any damages which A might subsequently claim and recover against them. It was admitted that the market price of steel at the time of the repudiation was substantially higher than the contract price.

The trial judge held that the loss of profit claimed was not too remote, although it was consequent upon the plaintiffs' impecuniosity, because it might reasonably have been in the contemplation of the parties as likely to flow from the breach of contract. He also granted the declaration claimed by the plaintiffs that they should be indemnified against any damages that might be recovered against them by A. On appeal by the defendants:—

Held, that it must have been in the contemplation of the parties that in the event of a breach of the contract the loss to the plaintiffs would be their profit on the transaction. Therefore, although the loss resulted from their own impecuniosity, the plaintiffs were entitled to recover it.

Dicta of Lord Wright in *Monarch Steamship Co. Ld.* v. *Karlshamms Oljefabriker A/B* [1949] A.C. 224 followed.

Held, further, that the defendants had no knowledge that A depended on the credit in order to get the goods themselves and therefore it could not have been in the contemplation of the parties that A might have a claim for special damages against the plaintiffs; that even if that head of damage was recoverable it would not be correct to make a declaration of indemnity, and to that extent the appeal must succeed.

Decision of McNair J. [1952] 1 K.B. 285 partly affirmed, partly reversed.

APPEAL from McNair J.[1]

In September, 1950, the plaintiffs, a Belgian company, who had contracted to buy from another Belgian company, the S. A. Azur, 1,000 tons of steel at a mean price of 7,555 Belgian francs per ton, agreed to sell the steel to the defendants, general merchants and commission agents trading in London, at a mean price of 8,025 Belgian francs per ton. Neither the plaintiffs, the defendants, nor S. A. Azur were in a position to provide the financial resources necessary to obtain delivery of the steel from the manufacturers, and it was accordingly provided by the contract between the plaintiffs and the defendants that payment was to be made by the defendants by cash against shipping documents from a confirmed credit, to be opened by the Leland Corporation, an American company, to whom the defendants had resold the steel, the credit to be opened at a named Belgian bank in favour of S. A. Azur. The credit was in fact never opened, and on October 16 the defendants repudiated the contract. The plaintiffs thereupon brought the present action, claiming, as damages for breach of contract, their loss of profit on the transaction, namely, £3,214 5s. 8d. They also claimed a declaration that they were entitled to be indemnified against any damages which might be recoverable against them by the S. A. Azur.

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[1] [1952] 1 K.B. 285.

It was admitted that at the date of the breach the market price of steel was higher than the contract price of 8,025 Belgian francs per ton, but owing to their impecuniosity the parties were unable to take advantage of the rising market.

McNair J. held that there was a firm agreement between the representatives of the parties that the defendants should purchase the steel and procure that the American corporation would make available forthwith a credit in favour of S. A. Azur; that on the facts as found by him the loss of profit claimed by the plaintiffs was not too remote, although consequent upon their own impecuniosity, because the loss was such as might reasonably be expected to have been in the contemplation of the parties as likely to flow from the breach of the obligation undertaken by the defendants. He also held that the plaintiffs were entitled to the declaration of indemnity claimed.

The defendants appealed.

Rodger Winn for the defendants. The judge erred in holding that the defendants undertook to procure a credit. Having regard to his finding that each of the parties knew that the other was unable to carry the burden of the financial transaction it is contrary to probability that the defendants would accept, with a contracting mind, the obligation to open the credit. As to the measure of damages, prima facie this is a contract for the sale of goods, and where at the date of the breach the market price of the contract goods was higher than the contract price, then on the repudiation by the buyer the seller can claim only nominal damages, because the seller can resell the goods at a profit. The compensation must be as nearly as possible what will put the injured party in the same position as he would have been in if there had been no breach. Special damages will only be given for reasonable expenses which the parties could reasonably have contemplated. Regard should not be had to the price at which the buyer under the contract resold, or to the price at which the seller bought unless the buyer, being unable to get the goods from the seller, has to buy in the market. Then the difference between the contract price and the market price is the measure of damages. Here the learned judge has given to the plaintiff sellers damages because, owing to their impecuniosity, they are unable to take up the goods and sell at a much higher price.

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The defendants' breach is really a failure to pay money and only interest is recoverable: *Wallis* v. *Smith.*[2] Failure to pay a sum of money, even with knowledge that it will cause destruction of another's trade, does not give rise to damages: *British Columbia Saw Mills Ld.* v. *Nettleship.*[3]

The loss suffered by the plaintiffs was really due to their own impecuniosity and therefore is in law too remote: see *The Liesbosch*[4] and *Muhammad Issa el Sheikh* v. *Ali.*[5]

The declaration of indemnity should not have been granted. That S. A. Azur might have a claim for damages was not and could not have been contemplated by the parties, and the imposition on the defendants of a potential liability must fail for remoteness.

Mocatta Q.C. and *T. G. Roche* for the plaintiffs. The trial judge found that there was a binding contract between the parties, and it is submitted that this court will not depart from that finding. The plaintiffs are clearly entitled to recover their loss of profit. It is a question of fact for the tribunal to decide, whether or not in any particular case the impecuniosity of the sellers can be said to have been within the reasonable contemplation of the parties. The plaintiffs' case comes within the principle of *Hadley* v. *Baxendale*,[6] as explained by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman.*[7] With regard to the question of indemnity, the plaintiffs rely on *Household Machines Ld.* v. *Cosmos Exporters Ld.*[8]

Cur. adv. vult.

March 28. The following judgments were read:—

SOMERVELL L.J., having stated the facts and read the material documents, correspondence and evidence, and found that the defendants had repudiated their agreement, continued:—With regard to the measure of damage, the plaintiffs claimed, and the judge awarded them, a sum equal to the profit which they would have made if the credit had been opened and the successive sales had gone through. This was £3,214 5s. 8d. It was not disputed before us that at the date of the breach the market price of steel was higher than the contract price. I agree, of course, with Mr. Winn that prima facie in these circumstances, on a repudiation by the buyer, the seller can claim nominal damages only.

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[2] (1882) 21 Ch.D. 243.
[3] (1868) L.R. 3 C.P. 499.
[4] [1933] A.C. 449.
[5] [1947] A.C. 414.
[6] (1854) 9 Exch. 341.
[7] [1949] 2 K.B. 529.
[8] [1947] K.B. 217.

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The two rules in *Hadley* v. *Baxendale*[9] were recently considered by this court, and their operation analysed by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*[10] There is also a helpful sentence which I will cite from Lord Wright's speech in *Monarch Steamship Co. Ld.* v. *Karlshamms Oljefabriker A/B*[11]: "These general statements could be "multiplied, but the question in a case like the present must "always be what reasonable business men must be taken to "have contemplated as the natural or probable result if the "contract was broken." The judge found, and on this point the evidence wholly supports his finding, that the plaintiffs and defendants knew that neither of them were in a position to open the necessary credit. Their role was that of intermediaries making a profit if the defendants had been able to perform their undertaking to procure the opening forthwith by the Leland Corporation of the necessary credit. This then was, it is said, the contemplated loss if the defendants failed to carry out their undertaking.

The judge summarized the issue in this way: "It was estab-"lished that at all material times the market value of the steel "in the hands of anyone who was in a financial position to obtain "it from the suppliers, was in excess of the contract price as "between the plaintiffs and the defendants, but it was also "established that both the plaintiffs and the defendants knew "that neither of them were in a position to put up the necessary "Belgian francs to satisfy their purchase obligations, unless the "American buyers made the money available through their "letter of credit. Accordingly, it would be within the reasonable "contemplation of both of them that failure to put up the letter "of credit would mean that the deal could not go through." In the present case the seller would get only nominal damages if the prima facie measure as laid down in section 50 (3) of the Sale of Goods Act was applicable. He gets more than the prima facie measure. One can imagine cases in which the principle as applied by the judge would give him less. If the market price had fallen so that the prima facie measure gave a larger sum than the loss of profit, the seller might find himself restricted to his loss of profit on the deal if that was the loss contemplated in the circumstances by the parties.

Mr. Winn submitted that the defendants' breach was a failure to pay money, and that the only damage recoverable in such a

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[9] 9 Exch. 341.

[10] [1949] 2 K.B. 529, 539.

[11] [1949] A.C. 196, 224.

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case is interest: *Wallis* v. *Smith.*[12] The judge regarded the principle as inapplicable to a failure to procure the provision of a letter of credit. There is, I think, a further difficulty. If, on a sale of goods, the buyer fails to open a credit or to provide the purchase price, and this can be and is accepted as a repudiation of the contract, the principle clearly has no application. The seller is not entitled merely to interest but to damages to be assessed according to the prima facie measure or having regard to the special circumstances, if any. This seems to show that the principle relied on by Mr. Winn is inapplicable in the present case even if one treats the failure to open the credit as a failure to pay money.

Mr. Winn further submitted that the loss here was due to the plaintiffs' impecuniosity, and that such loss is in law too remote. We were referred to *The Liesbosch*[13] and *Muhammad Issa el Sheikh Ahmad* v. *Ali.*[14] The result is stated by Lord Wright in the former case, namely, that damages due to impecuniosity may not be too remote if the loss might reasonably be expected to be in contemplation of the parties. The judge stated his conclusion as follows: "Here I have reached the conclusion, on the facts "of this case, that the loss of profits claimed by the plaintiffs "is not too remote, although consequent upon the plaintiffs' "impecuniosity, because the loss was such as might reasonably "be expected to be in the contemplation of the parties as likely "to flow from the breach of the obligation undertaken by the "defendants." I agree with that conclusion, and have only one comment to make upon it. The real question is what was the loss contemplated by the parties rather than the reason for it. Even if the plaintiffs had been very rich it might still have been "contemplated" that if the defendants did not procure the obtaining of the credit the plaintiffs could not and would not themselves have used their resources for the opening of a credit for this steel.

The judge ordered a declaration that the plaintiffs were entitled to recover from the defendants such damages as in law may be due from them to S. A. Azur, and which they may be adjudged liable to pay. The question whether this damage was too remote was, I think, argued more fully before us than before the judge. The defendants undoubtedly knew that S. A. Azur were sellers to the plaintiffs. The credit was to be opened in their name. Prior to October 1 and, therefore, at the time of the contract between plaintiffs and defendants, the matter as between the plaintiffs and S. A. Azur appeared to have been conducted orally. There is no evidence that the defendants were aware either of S. A. Azur's "impecuniosity," or their position vis-à-vis the manufacturers, except that they had an option. As the credit, although transferable, was to be opened in their name, the defendants might, if they had considered the matter, have assumed their relationship with the manufacturers was a close one, and that they might still be parties to the sale of the steel, perhaps at a higher price and profit, if the defendants failed in their obligations to the plaintiffs.

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[12] 21 Ch.D. 243.

[13] [1933] A.C. 449.

[14] [1947] A.C. 414.

I have come, with respect, to the conclusion that there is not sufficient evidence, applying the judge's principle as between plaintiffs and defendants which I have quoted, to justify the extension of that principle to any claim S. A. Azur may have against the plaintiffs. I think it is too remote. The judge, in making the declaration which he did, followed with modification a declaration made in somewhat similar circumstances by Lewis J. in *Household Machines Ld.* v. *Cosmos Exporters Ld.*[15] The problem can be shortly stated. B sues C for breach of contract. The court holds that B is entitled as against C to recover damages in respect of B's liability to A arising out of C's breach of contract. At the time of the hearing B is not in a position to call evidence to quantify this damage. There may be some cases in which the court can state a principle which makes the subsequent quantification of this damage simple. On the other hand, difficult questions may arise, depending, for example, (1) on any variation of the terms of the contract between B and C as between B and A, (2) on the question whether A took the steps which should have been taken to mitigate damage. No declarations ought to prejudice or preclude a proper determination of these issues, on which the defendants should be entitled to be heard. It might, as it seems to me, be more satisfactory if there were liberty to apply for directions as to the determination of these issues, if any, and quantification of damages under this head as between plaintiffs and defendants, should disputes arise. Some order in this form, at any rate, in some cases, might be more satisfactory than a declaration in the form ordered.

I think the appeal should be allowed to the extent I have stated.

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[15] [1947] K.B. 217.

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DENNING L.J. This is another case concerned with the modern practice whereby a buyer agrees to provide a banker's confirmed credit in favour of the seller. This credit is an irrevocable promise by a banker to pay money to the seller in return for the shipping documents. One reason for this practice is because the seller wishes to be assured in advance not only that the buyer is in earnest but also that he, the seller, will in fact obtain his money when he delivers the goods. Another reason is because the seller often has expenses to pay in connexion with the goods and he wishes to use the credit so as to pay those expenses. He may, for instance, be himself a merchant, who is buying the goods from the growers or the manufacturers, and has to pay for them before he can obtain delivery, and his own bank will only grant him facilities for the purpose if he has the backing of a letter of credit. The ability of the seller to carry out the transaction is, therefore, dependent on the buyer providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.

What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation "subject to "the opening of a credit" is rather like a stipulation "subject "to contract." If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

The first question is: what was the nature of the stipulation in this case? When the buyers sent their order, they stated in writing on September 25, 1950, that "a credit will be opened "forthwith." It was suggested that the buyers were not making any firm promise on their own account, but were only passing on information which had been given to them by their American buyers. The judge did not accept that suggestion and I agree with him. The statement was a firm promise by the buyers by which they gave their personal assurance that a credit would be opened forthwith. At that time there were some discrepancies about gauges and dates of delivery which had to be cleared up. But these were all resolved at the meetings in Brussels, and there was then, as the judge found, a concluded contract by the sellers to sell, and the buyers to buy, the steel for December–January delivery, and it was a part of that contract that the buyers would be personally responsible for seeing that a credit should be opened forthwith. On those findings it is clear that the stipulation for a credit was not a condition precedent to the formation of any contract at all. It was a condition which was an essential term of a contract actually made.

That condition was not fulfilled. The sellers extended the time for the credit but it never came, not even after reasonable notice. The sellers were, therefore, discharged from any further performance on their side, and are entitled to claim damages. But what is the measure of damages? That is the important question in the case. The price of the goods had steadily risen from the date of the contract onwards, and the buyers say that the sellers could at any time have resold the goods for more than the contract price, and are, therefore, only entitled to nominal damages. If the claim of the sellers had been for damages for non-acceptance of goods, or for repudiation of the obligation to take delivery, then the damages would, no doubt, be nominal. But it is none of those things. It is a claim for damages for not providing a letter of credit. The buyers say that, even so, the credit is only a way of paying the price, and that the damages recoverable on that score are only nominal, because the seller could resell the goods at a profit.

This argument reminds me of the argument we heard in *Pavia & Co. S.P.A.* v. *Thurman-Nielsen.*[16] It treats the obligation to provide a credit as the same thing as the obligation to pay the price. That is, I think, a mistake. A banker's confirmed credit is a different thing from payment. It is an assurance in advance that the seller will be paid. It is even more than that. It is a chose in action which is of immediate benefit to the seller. It is irrevocable by the banker, and it is often expressly made transferable by the seller. The seller may be relying on it to obtain the goods himself. If it is not provided, the seller may be prevented from obtaining the goods at all. The damages he will then suffer will not in fact be nominal. Even if the market price of the goods has risen, he will not be able to take advantage of the rise because he will not have any goods to resell. His loss

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[16] [1952] 1 K.B. 84.

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Denning L.J.

will be the profit which he would have made if the credit had been provided. Is he entitled to recover that loss? I think he is, if he can show that such a loss was at the time of the contract foreseeable by the buyer as the probable consequence of a breach: see the *Victoria Laundry* case.[17] That was clearly the case here. The buyers knew that the sellers could not obtain the goods at all unless the credit was provided. The foreseeable loss was the loss of profit, no matter whether the market price of the goods went up or down. It is, therefore, the proper measure of damages.

It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the recent statute: see *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[18]; but the ground was that interest was "generally presumed not to be within the contemplation of "the parties": see Bullen & Leake, 3rd ed., at p. 51. That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable. It is not necessary, however, to come to a firm conclusion on this point, because I regard the provision of a credit as different from the payment of money and not subject to the special rules, if any there are, relating thereto.

It was also said that the damages were the result of the impecuniosity of the sellers and that it was a rule of law that such damages are too remote. I do not think there is any such rule. In the case of a breach of contract, it depends on whether the damages were reasonably foreseeable or not. In the present case they clearly were.

There is one way, however, in which the buyer might be able to rely on the rise in price. It might be a ground for mitigation of damages. I can well understand that the buyers might in some cases be able to say that the sellers ought to have offered the goods elsewhere and found someone else to provide a letter of credit. But no such case can be made here. The sellers acted very reasonably throughout. They kept the matter open for the buyers in the hope and expectation that the credit would be provided, and eventually lost their own option because the credit was not provided. The sellers have, therefore, lost their profit without any fault on their part and they are entitled to recover it from the buyers as damages.

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[17] [1949] 2 K.B. 529.

[18] [1893] A.C. 429.

The only remaining question is whether the sellers are entitled to be indemnified for any damages they may have to pay the Azur Company who were selling to them. I think not. That is a special loss which was not within the contemplation of the parties to this contract. The buyers did not know that the Azur Company depended on the credit in order to obtain the goods themselves. The buyers had no reason to suppose that, on a rising market, the Azur Company would have any claim against the sellers. This head of damage is, therefore, not recoverable. I would only add that I agree with my Lord that, even if this head of damage were recoverable, it would not be correct to make a declaration of indemnity. If the liability of the sellers to a third party were within the contemplation of the parties, but had not yet been assessed, then the proper course for the judge was to reserve that head of damages. Judgment could be entered for the damages already ascertained, leaving the rest to be ascertained later by the same or another judge.

I agree with my Lord that the appeal should be allowed as to the declaration but dismissed as to the money award.

Romer L.J. I agree with the judgments which have been delivered and with the proposed order. I only desire to make two observations. First, I am not, as at present advised, prepared to subscribe to the view that in no case can damages be recovered for non-payment of money; I agree with Denning L.J. that in certain circumstances such damages might well be recoverable provided that the loss occasioned to the plaintiff by the defendant's default was reasonably within the contemplation of the parties when the bargain between them was made. Secondly, I am also in agreement with my brethren that there is no rigid rule that damage suffered by a plaintiff and resulting from his own impecuniosity is in all cases too remote to be recoverable in an action based on breach of contract.

Appeal dismissed as to damages but allowed as to declaration of indemnity.

Solicitors: *A. & G. Tooth; Hardman, Phillips & Mann.*

A. W. G.

C. A.

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March 7.

Singleton, Birkett and Morris L.JJ.

GULLIVER *v.* CATT AND ANOTHER.

[1950 G. 1459.]

Agriculture — Agricultural holding — Tenancy in writing — Tenants' breaches of undertakings—Landlord's right to sue in Queen's Bench Division—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 57 (3), 70 (1) *and* 99.

The defendants, who were tenants of a holding within the meaning of the Agricultural Holdings Acts, on December 16, 1947, were given by their landlord notice to quit the holding, which, according to its tenor, expired at Michaelmas, 1949. The tenants failed to comply with the notice. The plaintiff, the landlord, issued a writ on June 9, 1950, claiming possession of the holding and damages for certain breaches of undertakings by the tenants contained in the written agreement of tenancy.

The trial judge held that the notice to quit was valid and gave judgment for possession and the tenants gave up possession on March 5, 1952. The tenants contended that the landlord's claim for breaches of the tenants' undertakings could only be determined by arbitration under the Agricultural Holdings Act, 1948, since by section 70 (1) of that Act it arose " under agreement " and " on " (but it was admitted not " out of "), " the termination of the " tenancy of the holding " and to establish this they relied on section 57 (3) of the Act by which the landlord might claim compensation " in respect of matters specified therein under and in accordance with " a written contract of tenancy," only on the tenants quitting the holding. They admitted that unless they could bring their case within section 57 (3), section 70 would not apply and the landlord's claim in the Queen's Bench Division was not barred.

Held, that the tenants' contention was nullified by the terms of section 99 of the Act, since by the finding of the judge they must be considered as having " quitted the holding after the commence- " ment of this Act in consequence of a notice to quit given before " March 1, 1948."

Preston v. *Norfolk County Council* [1947] K.B. 775, applied.

Accordingly, the provisions of the Act relating to " the rights " of landlords, tenants and occupiers to compensation " (which included the provisions of sections 57 and 70) did not apply and the landlord was not debarred from suing in a court of law.

Semble, section 57 (3) did not apply for that section pre-supposed that the tenant had quitted the holding on the termination of the tenancy and when the action was instituted and heard the tenant had not quitted. *Quaere* also whether a claim arising on the tenant's quitting the holding on the termination of the tenancy can be brought within section 70 (1) (*g*) which deals with claims arising on or out of the termination of the tenancy of the holding or a part thereof.

Decision of Barry J. affirmed.

APPEAL from Barry J.

The plaintiff, Charles Gulliver, was the owner of the Great Worsham Farm, Bexhill-on-Sea, of which the defendants, the administrators of Ethel May Catt, were the tenants. The farm was a holding, within the meaning of the Agricultural Holdings Acts, of which the rent was £200 a year. The owner, on December 16, 1947, gave the tenants notice to quit the farm, which, according to its tenor, expired at Michaelmas, 1949. On March 1, 1948, Part III of the Agriculture Act, 1947, came into force. So far as material the provisions of that Act were similar to the provisions of the Agricultural Holdings Act, 1948, which came into force on July 30, 1948.

The tenants had remained in possession of the farm after Michaelmas, 1949, and did not quit possession until March 5, 1952. The plaintiff, who issued his writ on June 9, 1950, claimed possession of the farm and damages for breaches of the following undertakings in the tenancy agreement: "(3) During the said "term to keep in proper repair as a farm road so much of the "road adjoining the said farm as the outgoing tenant has been "liable to repair. (4) To keep and leave the house, farm buildings and cottages and all other parts of the said farm and "premises in a state of good tenantable repair on being found "the necessary materials by the landlord within a distance of "five miles, but she shall not be called upon to leave the house, "cottages and buildings in a better state than at entry, as evi-"denced by the record to be attached hereto. (5) To keep the "hedges properly made and the ditches and watercourses properly "cleaned and scoured, the landlord finding the necessary stakes "and wires." And particulars were given of the breaches.

The tenants contended that the landlord's claim for breaches of undertakings could only be determined by an arbitration under the Agricultural Holdings Act, 1948, since by section 70 (1)[1] it

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[1] Agricultural Holdings Act, 1948, s. 57: "(1) The landlord of an agri-"cultural holding shall be entitled to "recover from a tenant of the hold-"ing on the tenant's quitting the "holding on the termination of the "tenancy, compensation in respect of "the dilapidation or deterioration of, "or damage to, any part of the hold-"ing or anything in or on the hold-"ing caused by non-fulfilment by the "tenant of his responsibilities to farm "in accordance with the rules of good "husbandry.

"(2) The amount of the compensa-"tion payable under the foregoing "subsection shall be the cost, as at "the date of the tenant's quitting the "holding, of making good the dilapi-"dation, deterioration or damage.

"(3) Notwithstanding anything in "this Act, the landlord may in lieu "of claiming compensation under sub-"section (1) of this section, claim "compensation in respect of matters "specified therein under and in "accordance with a written contract "of tenancy so however that (a) com-was a claim that arose under agreement and on (but it was admitted not "out of") the termination of the tenancy of the holding, which "shall be determined by arbitration under this "Act." To establish that the claim arose "on the termination "of the tenancy" they relied on section 57 (3) of the Act (see section 29 of the Act of 1947), by which the landlord might claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy on the tenants quitting the holding. Counsel agreed that unless they could bring their case within section 57 (3), then section 70 (which they had pleaded in bar of the landlord's claim for breaches of undertakings in the written contract) would not apply. They argued that by reason of section 57 (3) the landlord's claim was one "on . . . the termination of the tenancy of the holding," and so came within section 70 (1) (*b*).

Counsel for the landlord submitted that under section 57 (3) the landlord was given an option to claim for breaches of undertakings under the written contract, instead of claiming under section 57 (1) compensation for dilapidation, deterioration or damage caused by non-fulfilment of the tenant's responsibilities to farm in accordance with the rules of good husbandry. The landlord, the plaintiff, was given an option, and it was true that, if he exercised it, he could only claim compensation on the tenant's quitting the holding, but there was nothing in section 57

"pensation shall be so claimed only "on the tenant's quitting the holding "on the termination of the tenancy, "and (*b*) compensation shall not be "claimed in respect of any one holding both under such a contract and "under the said subsection (1); and "for the purposes of paragraph (*b*) of "this subsection any claim under subsection (1) of section 7 of this Act "shall be disregarded."

Section 70: "(1) Without prejudice "to any other provision of this Act "any claim of whatever nature by the "tenant or landlord of an agricultural "holding against his landlord or "tenant, being a claim which arises— "(*a*) under this Act or any custom or "agreement; and (*b*) on or out of the "termination of the tenancy of the "holding or part thereof, shall, subject to the provisions of this section "be determined by arbitration under "this Act. . . .

"(*b*) This section shall not apply to "a claim arising on or out of the "termination of a tenancy before "March 1, 1948."

Section 99: "In a case where the "tenant of an agricultural holding "has quitted the holding before the "commencement of this Act, or quits "it after the commencement of this "Act in consequence of a notice to "quit given (whether by him or his "landlord) before March 1, 1948 . . . "the provisions of this Act, so far as "relating to the rights of landlords, "tenants and occupiers to compensation . . . shall not apply, and in "lieu thereof the enactments specified "in the Eighth Schedule to this Act, "so far as relating to the matters "aforesaid, shall continue to apply "and shall accordingly be excepted "from the operation of the last foregoing section."

to show that the landlord must take that course. If it was desired to show that the rights of any person to resort to the Queen's courts were taken away, that must be shown by the clear language of a statute.

Barry J. did not express any final view on this argument, but adopted the further contention put forward by counsel for the landlord that even if by reason of section 57 (3) the landlord's claim came within the terms of section 70 of the Act, it was nullified by reason of the terms of section 99. Counsel for the tenants agreed that if section 99 applied, that was an end of his clients' case. But they said that section 99 could not apply, because of the words "has quitted the holding before the commencement of this Act or quits it after the commencement of "this Act in consequence of a notice to quit given . . . before "March 1, 1948." The tenants in this case, they said, had not quitted the holding at the date of the writ or of the hearing or until March 5, 1952.

Barry J. held that the notice to quit was good, and gave judgment for the plaintiff for damages for breaches of undertakings, and the parties agreed (subject to the defendants' contention) that the damages should be assessed by an official referee. Judgment was given on October 12, 1951.

The defendants appealed, and the sole question on the appeal was whether the plaintiff was entitled to bring an action in respect of his claim for damages for breaches of the undertakings.

Percy Lamb Q.C. and *D. Peck* for the tenants.
F. S. Laskey for the landlord.

SINGLETON L.J. Mr. Lamb has contended for the tenants that the claim of the landlord came under section 70 of the Agricultural Holdings Act, 1948; that it was a claim for damages under an agreement, and that it arose on the termination of the tenancy of the holding. He did not claim that it arose out of the termination of the tenancy. Accordingly, counsel submitted that the claim must be determined by arbitration under the Act of 1948. His claim that it arose on the termination of the tenancy was based on his submission in regard to section 57 of the Act. Section 57 provides for compensation to the landlord on termination of the tenancy for deterioration of the holding.

[His Lordship read subsections (1), (2) and (3) of section 57 and continued:] Counsel for the tenants submitted that if a tenancy agreement contained covenants such as those which are sued upon in this case, and if there were breaches of those covenants, which breaches gave rise to dilapidations, deterioration, or damage, it was open to the landlord, instead of claiming under those covenants, to claim under the provisions of section 57 (3); that is, to claim compensation under the Agricultural Holdings Act, 1948. I draw attention to the words in subsection (3), "the landlord may, in lieu of claiming compensation "under subsection (1)." Prima facie, if a tenancy agreement contains covenants of the kind I have mentioned, and there is breach of them with dilapidation, or deterioration, or damage, resulting, the landlord might have a claim under the Agricultural Holdings Act, 1948, and he might also have a claim for damages for breach of covenant. Mr. Lamb submitted that they are both brought into one by section 57 (3), and that the claims which are made in this case ought to be regarded as coming within that subsection, and so to be determined by arbitration under the Act of 1948.

Counsel for the landlord invited the court to consider the words in section 57 (3), "the landlord may, in lieu of claiming "compensation under subsection (1) of this section claim com"pensation in respect of" the breaches so far as the breaches also are matters under subsection (1). The landlord, he submitted, was given an option, and if he exercised that option he could only claim compensation on the tenant quitting the holding; but counsel said that there was nothing in section 57 to show that the landlord was obliged to take that course, and there was no reason why the landlord should take that course, particularly if the claim were something which arose in the middle of the tenancy; and he added that if it were desired to show that the rights of any person to resort to the Queen's courts were taken away, it must be shown by clear language; and from this he argued that the option given to the landlord by section 57 (3) did not deprive the landlord of that right. Counsel for the tenants agreed that unless he could bring this claim within section 57 (3), section 70 would not apply and the claim before Barry J., in the Queen's Bench Division, was not barred.

Breaches of undertakings 3, 4 and 5 in the tenancy agreement were alleged in paragraph 8 of the statement of claim, and extensive particulars were given. A number of the items related to the house, and still more to the land, hedges and the like. That claim was one made by the landlord for breaches of undertakings in the tenancy agreement, and it might well be that if such a claim were put forward, when the tenant quitted the holding, the landlord could, if he liked, have treated it in the way envisaged as possible by section 57 (3); but the landlord has said: "I do not want so to do." Mr. Laskey pointed out that some of the items in the particulars might come within subsection (1), but not all. The landlord's case is: I am claiming my rights under a written tenancy agreement; there have been breaches of that agreement, and I claim damages in the Queen's Bench Division.

The tenants' contention is that under section 57 (3) this claim arose on the termination of the tenancy, and therefore it came within section 70 (1) (*b*). For myself, I am not satisfied that it did. Section 70 (1) (*b*) deals with a claim arising "on or out "of the termination of the tenancy of the holding or part "thereof"; and section 57 throughout is dealing with a position which arises on the tenant quitting the holding on the termination of the tenancy—a different proposition. The whole of section 57, indeed, presupposes the tenant quitting the holding. At the time that this answer of the tenant was set up the tenant had not quitted the holding; the tenant was still on the holding; the landlord could not get compensation under section 57 until the tenant had quitted the holding. Is it open to the tenant to say: "I am not going; I am staying here as long as I like, or "as long as I can; I am not going to pay you damages which "you claim, because the claim ought to be regarded as compen- "sation claimed under section 57, and I am not going to pay "you compensation under section 57, because I have not quitted "the holding"? It does not sound to me to make sense. I do not think section 57 (3) applies to bring the tenants within section 70 of the Act of 1948.

It is a complicated matter, and Barry J. did not express any final view on that part of the case. He dealt with the case under section 99 of the Act. The submission made on behalf of the landlord is that even if it could be said that the landlord's claim in this case fell under section 70 of the Act, it is taken out of it again by section 99. [His Lordship read the section.]

It is not necessary that I should specify the enactments specified in Sch. VIII to the Act. Mr. Lamb agrees that if section 99 applies to this case he is out of court; he is thrown back again upon the provisions of the Act of 1923. I do not mention the Act of 1947, because for this purpose it was the same as the Act of 1948.

Mr. Lamb submitted, in the first place, that section 99 could not apply because of the words "has quitted the holding before "the commencement of the Act or quits it after the commencement of this Act in consequence of a notice to quit given . . . "before March 1, 1948." He said that could not apply, because (a) the tenants had not quitted the holding before the commencement of this Act, and (b) they had not quitted on the date of the hearing; they were still there. As I have already said, the quitting of the holding by the tenant referred to in section 57 is something which must occur before the landlord can get his compensation, but when one finds this submission made by Mr. Lamb one is forced to ask one's self what is the position of a tenant, or of tenants, who say: "I cannot have that section used against "me, because I had not quitted on the day of trial. True, I "ought to have done; true, I got a notice to quit, and the trial "judge has held that to be a good notice; I ought to have been "out 18 months ago, but here I am." That, to my mind, is not a very sound argument; it is blowing hot and blowing cold; or, to put it another way, seeking to take advantage of his own (I will not say wrong, but of his) failure to act upon a perfectly good notice to quit. That submission really was not pressed; but, if I may go further into the matter, it is agreed by everyone that upon the authorities if a tenant is given a notice to quit, and that is subsequently held to be a good notice by the court, and upon the order of the court the tenant goes out, the tenant goes out in consequence of a notice to quit. The tenant has now gone out, and he has gone out in consequence of a notice to quit. The notice to quit was given on December 16, 1947; that is, before March 1, 1948, the date when Part III of the Act of 1947 came into operation. Thereupon it is said that the provisions of this Act, so far as relating to the rights of the landlord to compensation, shall not apply. Mr. Lamb submitted that those words, "the "rights of landlords, tenants and occupiers to compensation," did not cover this case. I do not know why. If reference is made to the section on which Mr. Lamb placed reliance (section 57 of the Act of 1948), that section, with which I have dealt already, gives a right to the landlord to compensation on the tenant quitting on the termination of the tenancy in respect of dilapidation or deterioration of, or damage to, any part of the holding. Section 57 (3), which Mr. Lamb prays in aid so as to bring him under section 70, provides that: "Notwithstanding "anything in this Act, the landlord may, in lieu of claiming "compensation under subsection (1) . . . claim compensation "in respect of matters specified therein under and in accordance "with a written contract of tenancy. . . ." If, then, there be in the matters included in the undertakings which are within subsection (1) breaches giving rise to something in respect of which the landlord might recover compensation on the tenant quitting the holding on the termination of tenancy by reason of subsection (3), they appear to me to be within section 99; while if there are other matters entirely outside any right to compensation, no question under the Agricultural Holdings Act, 1948, arises. What I mean is there may be some items not within section 57 (1) at all. Those would not be matters for compensation under section 57 (3), but if there were claims of the nature covered by section 57 (1) which the landlord could, if he liked, cause to be dealt with under section 57 (3), those matters, I should say, come within the words of section 99: ". . . the "provisions of this Act, so far as relating to the rights of land-"lords, tenants and occupiers to compensation . . . shall not "apply. . . ."

That was the view of Barry J., and it is the view I take. Even if I should be wrong in that which I have said with regard to section 57, I think, as Barry J. thought, that section 99 is wide enough to take this case out of the provisions of this Act, including section 57.

For these reasons I think that this appeal ought to be dismissed.

BIRKETT L.J. I am of the same opinion, and in view of the judgment which has just been delivered, I can say what I have to say in a few sentences.

The question to be determined by the court is one of very great importance, and it may be put in this way: Has access to the Queen's Courts been taken away from the landlord in the circumstances of this case?

The plaintiff in the action, the landlord, claimed possession of the holdings and damages for breaches of undertakings contained in the tenancy agreement. The defendants, the tenants, said they could only be considered by an arbitrator under the appropriate provisions of the Agricultural Holdings Act, 1948.

I observe that the learned author, or editor, of Jackson's Agricultural Holdings and Tenant Right Value, 10th ed., in his preface uses these words: "It is also to be noticed that access to "the King's Courts has, with a few exceptions, been taken away "from both landlord and tenant of an agricultural holding." Then, on page 178, he discusses section 57, and at the bottom of that page he writes: "But now, by section 70, any claim of "whatever nature which arises on or out of the termination of a "tenancy must be determined by arbitration under the Act"; and, finally, at page 193, he says, with regard to section 70: "These opening words must be borne in mind in determining "the meaning and effect of this section, which only deals with "claims between landlord and tenant on the termination of the "tenancy. During the currency of the tenancy the landlord and "tenant may still have freedom to have their differences determined in an action in a court of law unless the Act directs that "the difference shall be settled by arbitration."

I should like to say how very much indebted I am to Mr. Lamb for the clearness of his argument on this rather complicated matter. As I understand his argument, he said: "It is "essential for me, if I am to succeed, that I should show that "this claim arose on or out of the termination of the tenancy; "that I must do, or fail"; and he said: "I therefore rely, as I "must rely, on section 57 (3) of the Act of 1948 (or the appropriate subsection of the Act of 1947), to show that my claim "in lieu of compensation mentioned in subsection (1) is, by that "subsection, postponed until the termination of the tenancy, "and that being so, I can then invoke section 70 and say this "claim arises on or out of the termination of the tenancy."

My Lord has dealt with that, and Barry J., who stated the matter plainly in the court below, said: "I am relieved from "the duty of dealing with it, because I think there is another "point which makes section 57 and section 70 quite inapplicable "to the present case, and that is section 99." By that section: "In a case where the tenant . . . quits it after the commencement of this Act in consequence of a notice to quit given . . . "before March 1, 1948, . . . the provisions of this Act, so far "as relating to the rights of landlords, tenants and occupiers to "compensation . . . shall not apply. . . ." So the real point under that section is whether this claim can properly come within the word "rights." Mr. Laskey said that under section 57 (3), where the rights were preserved and maintained, they were rights under the section of the Act, and, for my own part, I agree with the trial judge who dealt so fully with this matter. He sets out the argument of Mr. Lamb as follows: "The "defendants' arguments can, I think, be quite shortly stated. "Section 57 of the Act of 1948, which, in matters material to "this case, is similar in terms to section 29 of the Act of 1947, "provides that a claim by a landlord for compensation under and "in accordance with a written contract of tenancy in respect of "the dilapidation or deterioration of, or damage to, the holding "may only be made on the tenant quitting the holding on the "termination of the tenancy. The present claim, say the defen-"dants, is a claim for compensation or damages in respect of "dilapidation or deterioration of, or damage to, the holding, and "thus falls within the provisions of one or other of those sections. "The claim cannot, therefore, be made until the tenant quits "the holding—until the termination of the tenancy—and, for "this reason, says Mr. Lamb, it becomes a claim which arises on "or out of the termination of the tenancy."

As I have said, that was, in a sentence or two, the way Mr. Lamb has stated it to us. Then, when the judge considered section 99 he said: "The present claim was brought after the "notice to quit had expired; but the operative word in the Acts "is not 'bring,' but 'arise,' and I am satisfied that this claim "is not one which arises on or out of the termination of the "tenancy. Indeed, as I understand it, Mr. Lamb did not seek "to establish that it was, except by invoking the aid of the "express words of section 29 of the Act of 1947, or section 57 of "the Act of 1948, neither of which, to my mind, is applicable "to the present claim. Can the defendants obtain assistance "from any of the other sections of the Acts of 1947 or 1948 "upon which Mr. Lamb relied? I do not think they can." Then the judge goes on to consider section 70, and he said: "Section 70 of the Act of 1948 is, I think, a provision 'relating "'to the rights of landlords, tenants and occupiers to compen-"'sation and the payment and recovery of compensation,' "within the meaning of section 99; it is a section relating to "the settlement of claims and, I think, relates to the 'recovery "'of compensation.' If I am right in this view, the Act of "1948 can be wholly disregarded, and one must turn to the Act "of 1947." Then the judge discusses that matter, and then he continues: "I have already indicated that without the aid of "section 29 of the Act of 1947, or section 57 of the Act of 1948, "the plaintiff's present claim cannot be said to fall within this "category. Thus, in my judgment, the plaintiff is entitled to "pursue his claim for damages for breach of covenant in the "ordinary courts; and I would welcome counsel's assistance as "to the appropriate order which I should make for the disposal "of this claim."

I think, with great respect to Mr. Lamb's argument here today, that the finding of the judge about that matter and his construction of the section was right. I, too, agree that, having regard to the wording of section 99, this appeal fails and should be dismissed.

MORRIS L.J. I also agree. On a determination of the issues which were raised before him, the trial judge, by his order, directed that the defendants should give up possession. Obedience to the order of the court would bring about the result that the tenant would have quitted after the commencement of the Agricultural Holdings Act, 1948, within the words of section 99 of that Act. Following the decision of this court in *Preston* v. *Norfolk County Council*,[2] the tenant would have quitted in consequence of a notice to quit. That notice to quit was admittedly given before March 1, 1948. The opening words of section 99 of the Agricultural Holdings Act, 1948, would therefore be satisfied; namely, the words: "In a case where the tenant of an agricul-"tural holding has quitted the holding before the commence-"ment of this Act, or quits it after the commencement of this "Act in consequence of a notice to quit given . . . before" March 1, 1948. The result, therefore, once those opening words are satisfied, is that it is enacted that certain provisions of the Act, including, among others, those relating to the rights of landlords, tenants and occupiers to compensation, are not to apply.

In my judgment, section 57 of the Act of 1948 is one of the sections covered by those words, and the result is that there is an exclusion of section 57 which has the result that section 70 cannot be relied on by the tenants in this case, for their counsel relied on the applicability of section 57 (3) to bring section 70 into operation in this case.

When the provisions of section 99 have effect, then the matter is to be dealt with on the basis of the enactments specified in Sch. VIII. On that basis Mr. Lamb does not submit that his contention can prevail. The trial judge was entitled, in my judgment, at the time that he ordered possession to deal with the remaining claims in the action, including the claim for damages, on the footing that his order for possession was correct and would be obeyed. The judge was entitled to say that, by his adjudication, he made section 99 applicable. Paragraph 9 of the defence in the action reads: "Further, or in the further alterna-"tive, the defendants will rely on section 70 of the Agricultural "Holdings Act, 1948." When dealing with that matter the judge was entitled to do so on the basis of the decision at which he was arriving, which decision brought into operation section 99 of the Act, with the result that the provisions of section 70 would not avail the tenants.

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[2] [1947] K.B. 775.

I do not propose to say anything further with regard to section 57 beyond saying that I am in agreement with the way in which the matter has been dealt with by my Lords. I am not satisfied that the claims put forward in this action were claims that could be described as being in lieu of claims for compensation under section 57 (1). If they could not be so described, then they were not within section 57 (3). I find myself, therefore, in agreement that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett, for Menneer, Idle & Brackett, St. Leonards-on-Sea; Edwin Coe & Calder Woods, for Tomkins & Bowes, Bexhill-on-Sea.*

C. G. M.

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Mar. 24, 25.
Somervell, Denning and Romer L.JJ.

[1949 A. 3160]

Emergency legislation—Building—Licence—Work partly lawful and partly unlawful—Instalments paid on account under contract—Whether builder could appropriate payments to illegal part—Defence (*General*) *Regulations*, 1939 (*S.R. & O.* 1939, *No.* 927), 56A (2).

A contract in general terms for demolition and building work made between builders and the owner of the property provided for the payment of the contract price by instalments from time to time.

Before any licence had been granted, the builders carried out demolition work, for which a licence should have been, but was not, obtained under the Defence (General) Regulations, 1939; and the owner paid two instalments of £500 each under the contract. The builders' receipts for those amounts referred in terms to the unlicensed work. Later, licences for the work other than the demolition were granted, and the building proceeded on a lawful basis.

In an action by the builders for payment of the balance due under the contract, they appropriated to the unlicensed (and thus

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

illegal) work the total sum of the instalments paid by the owner before the licences were granted. In giving judgment for the plaintiffs for the balance due on the lawful part of the work, the trial judge left that appropriation undisturbed. On appeal by the owner:—

Held, that as the owner had paid the instalments under the contract generally and had not consented to their appropriation to the illegal work, he was entitled to appropriate to the cost of the lawful work the instalments paid before licences had been granted.

Decision of Morris L.J. reversed.

APPEAL from Morris L.J. sitting as an additional judge of the King's Bench Division.

In November, 1947, the defendant, James Jack Walker, bought a property at 3, Mill Lane, Arundel, Sussex, for repair and conversion into business and residential premises for himself and his family. Plans were passed by the Arundel Borough Council in February, 1948, and on March 15, 1948, the licensing authority received an application from the defendant for a licence to carry out building work in accordance with the approved plans. Those plans did not include demolition work.

On April 19, 1948, the defendant made an agreement with the plaintiffs, Messrs. A. Smith & Son (Bognor Regis) Ld., builders, on terms set out in a letter of April 20, as follows:— "We agree to carry out the demolition and building works of "No. 3, Mill Lane, Arundel, Sussex, according to the plan "handed to us, and passed by the Borough of Arundel Council, "February 12, 1948, with the exception that the west elevation "wall shall be demolished and rebuilt in 11 inch cavity brick-"work for the sum of £2,500. Any alterations or deviations "during the progress of the work shall be mutually agreed by "estimate before any alterations or deviations are commenced. "We undertake to commence the work tomorrow, Wednesday, "April 21, as arranged. We also agree to expedite in every "possible way the completion of the contract. Methods of pay-"ment required:—£500 immediate payment. Further payments "at intervals of 28 days to be agreed mutually . We will set a "target of completion in 10 weeks, and shall do our utmost to "beat this."

Work was begun on April 21. It proved necessary to start by demolishing the west wall; and between April 22 and July 29, further demolition work was carried out, at a cost of £1,733 odd. No licence was ever applied for or obtained in respect of these initial operations, the builders taking the view that it was

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emergency work which did not fall within the scope of the statutory requirements as to licences under the Defence (General) Regulations, 1939, No. 56A (2).[1]

In accordance with the contract, the defendant made payments of £500 each on April 30 and June 11, and the plaintiffs acknowledged these two amounts in letters which referred to the payments as being " for demolition of faulty structure at 3, Mill " Lane, Arundel " and " on account of work carried out at the " above."

Licences for building work to a total sum of £3,200 were issued on June 11 and July 30.

As the work proceeded, the costs greatly exceeded the original estimate, and a new agreement was substituted for the original contract. Later, disputes arose; and in December, 1949, the builders started proceedings against the defendant, claiming inter alia as a separate item on the pleadings the balance which remained unpaid of the total of £1,733 due on the unlicensed so-called emergency work, and appropriating to that illegal work the whole amount already paid by the defendant under the contract. They also alleged that he had fraudulently misrepresented to them that he had obtained a building licence for the work.

In his judgment, Morris L.J. decided, on the issues relevant to this appeal, that fraud had not been established; that under Defence (General) Regulation 56A a licence should have been obtained for the demolition work; that all the work done before the issue of the first licence on June 11 was illegal because unlicensed; that the receipts for the first two payments of £500 each issued to the defendant showed on their face that they were in respect of the illegal work; and that in the result the defendant could not claim to be credited with these payments against the claim under the contract as a whole, nor appropriate them to the post-June 11 licensed work.

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[1] Defence (General) Regulations, (1939), No. 56A (2): " Subject to the " provisions of this Regulation, the " carrying out in the United King- " dom, except for a purpose specified " in the first column of the Table set " out in Part I of the Sixth Schedule " to these Regulations, of any work " specified in Part III of that " Schedule, or of any maintenance " work on a building or on any such " works as are mentioned in Part II " of that Schedule, shall be unlawful " except in so far as there is in force " in respect thereof a licence granted " by the Minister: Provided that the " Minister may by order authorize " the carrying out of such work without a licence within such limits of " cost as may be specified in the " order, and may prescribe different " limits of cost for different classes " of work or for different classes of " property or for different areas, and " any such order may, without prejudice to the generality of this pro- " vision, limit the cost of the work, " or of the work of any class, that " may be carried out in any period " specified in the order of any single " property as defined in the order."

The defendant appealed.

The defendant in person. Morris L.J. based his decision on the words in the receipt referring to demolition work for which no licence was ever granted. It should have been based on the letter which made the general contract.

There was only one contract, and therefore if it was to be said that the first two instalments could be appropriated to the work done before the licences were obtained, then the whole of the work was illegal and no action could be brought to recover anything under the contract.

G. R. F. Morris for the plaintiffs. The original contract included on its face demolition work, which was never licensed nor intended to be licensed. There was no licence of any kind before June 11, and therefore the plaintiffs were entitled to regard payments before June 11 as payments in respect of work which was illegal because unlicensed.

[DENNING L.J. But it was the creditor, not the debtor, who appropriated the payments to the unlawful work. He was not entitled to do so.]

[SOMERVELL L.J. I doubt whether a creditor can appropriate a payment even to lawful work. If there is an entire contract for a lump sum, and the defendant breaks it before the work is complete, he might be able to claim for the work done on a quantum meruit; but he could not appropriate the payments made to particular items.]

I submit that that is not the correct view.

[DENNING L.J. The contract is that all the work is to be done for £2,500. When the debtor pays an instalment, it is under the contract generally. Surely it cannot be allocated to the work actually done?]

The difficulty for the defendant here is the absence of any document, *i.e.*, a licence, making the transaction lawful at the time he made the payments. He cannot put himself right by obtaining a licence at a later date, because he cannot make the licence retrospective for any purpose.

[SOMERVELL L.J. But in order to find out the character of the payments, you must look at the contract under which they were made. It is a single contract.]

I accept the view of the court that the payments were in respect of the contract; but what took place later to make the contract lawful—the issue of the licences—cannot be related back to events which occurred before the status of legality was achieved. This is a matter of general principles for which I cannot cite any authority.

[Somervell L.J. If there had been a specific appropriation with the consent of the defendant, that would be sufficient for the plaintiffs. But the judge relied on the receipts. I am not sure he was right.]

The payments were made when the only work done was unlawful; no subsequent act could make them lawful; and no remedy or right attaches to either party to revive the transaction involving the two payments of £500 each.

The defendant replied.

Somervell L.J. stated the facts, and continued:—The matter with which we are chiefly concerned in this appeal is this: the work required a licence; and one of the issues before the judge was an allegation of fraud by the plaintiffs against the defendant, namely, that he had orally represented to them that he had lawfully obtained a building licence in respect of the work other than the demolition and rebuilding of the west elevation wall and chimney, and that such licence had been issued authorizing the operations to be carried out at a cost not exceeding £2,500. That allegation of fraud failed before the judge. The position was (though it is not really material now), that the defendant had taken steps towards obtaining a licence and, as the plans had been passed by the Arundel council, he may well have assumed that a licence would be forthcoming in respect of the work other than the demolition of the west elevation wall. When the plaintiffs started work, as they did on April 21, they had no licence for the demolition of the west elevation wall, and there never was a licence for the demolition of that wall. It was sought to be said before the judge that that was emergency work and that, having regard to the provisions of the statutory rules and orders affecting licensing, it did not require a licence. The judge found against that contention and in my view he was plainly right. The appeal has proceeded on the basis that that was work which required to be licensed.

The main point is this: under the contract there was to be an immediate payment of £500, which was made on April 30, and further payments were to be made at intervals of 28 days to

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be agreed mutually. A further payment of £500 was made on June 11. Let us take a case somewhat simpler than this, a case where there is a lump sum contract for work for, say, £4,000; payments are made from time to time under provisions such as these—say, £2,500 spread over the course of the contract—and when the builder or contractor comes to sue for the balance it turns out that £1,000 worth of the work ought to have been, but was not, licensed. Perhaps he may have thought that it did not need a licence; but however that may have been, I am assuming, for the purpose of this example, that £1,000 worth of work was illegal because unlicensed and, therefore, on principles which have been laid down by this court and the House of Lords, no sum could be recovered in respect of it. The builder, therefore, could claim only £3,000. I think that the defendant in those circumstances would be entitled to say that the £2,500, which he had paid by instalments under general words such as those in this contract, should be allocated against the £3,000 which he was legally bound to pay. I do not think Mr. Morris, on facts so stated, and if those were the only facts, would really dispute that; but that is the conclusion which I would have come to.

The plaintiffs here seek to say that those first two payments of £500 each should be allocated to the work which has turned out to be illegal. The position with regard to illegal work is this: if there had been a separate contract for the western elevation wall and there had been no payment, the plaintiffs could not recover: nor could the payer recover payments made in respect of unlicensed work. If, therefore, these first payments are to be treated as appropriated or allocated to illegal work, they cannot be recovered, and could not be credited as against the legal licensed work. That is the view which the judge has taken. The question is whether he was right. I have just taken a simpler case than the present one, under which I think that the contention put forward by the defendant would have succeeded, namely, that the payments made must be allocated against the legal work. Are there matters here which differentiate it from that case? Mr. Morris has assisted us very much by his argument in elucidating the points and putting his submissions on them clearly. Having heard him, I think that it is a question of law on the documents and on the admitted facts. The admitted facts are that the first work done was this unlicensed work, and that at the time when these payments were made, that was the only work which had been done. Is that enough?

Before coming back to that, I will consider the other points on which the judge relied, and in respect of which the defendant submitted that the judge was wrong. I will read what the judge said. He based his judgment largely, if not wholly, on the wording of the receipts, having regard to the facts which I have stated: "Certain payments were made to the plaintiffs. . . . "The correspondence shows that £500 was received from the "defendant, and it is described as 'for demolition of faulty "'structure at 3, Mill Lane, Arundel.' Another letter in the "correspondence records that a further £500 was acknowledged "on June 15: 'We thank you for your cheque value £500 on "'account of work carried out at the above.' The defendant's "pleading is that those two cheques were dated respectively "April 23 and June 11. The letter I have just read speaks of "'work carried out.' Before June 11 there was no licence in "existence, and the works that had been carried out before the "licence was in existence were works that were unlawful, having "regard to regulation 56A (2), but payment of those two amounts "was in fact made by the defendant. The next payment was one "referred to . . . in the correspondence: 'August 9'"; and he refers to that, and to the receipt for it. He continues later on: "The defendant has pleaded as follows: 'Further, if (which is "'denied) the plaintiffs carried out work upon the said site "'exceeding in cost £3,200, the same was illegal, not being "'licensed pursuant to regulation 56A of the Defence (General) "'Regulations, 1939.' Even if the defendant had not taken that "point before the matter came into court, the court would have "to take the point. The position, therefore, is that any works "that are unlawful under regulation 56A (2) could not be made "the subject of a claim. What the defendant says is: 'There "'were only, in total, licences for £3,200. I have paid four "'sums of £500 and I am entitled to credits as well.' The "defendant is therefore seeking to say that the payment that he "made by cheque on April 23 is a payment which he can allocate "in respect of the work that was licensed, the £3,200. It was "put by counsel for the defendant that the first £500 was merely "a payment as contemplated by the contract: '£500 immediate "'payment'; but that was a payment for the work done, and "the plaintiffs . . . have said that the payments were 'expressly "'appropriated by the plaintiffs to and in respect of and on "'account of the work specified in paragraph 8, being the "'emergency operations carried out at the request of the

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" ' defendant and pursuant to the direction and/or authority of " ' the said Simmonds acting for and on behalf of the Arundel " ' Town Council.' Those latter words were struck out in the " amended statement of claim. I have held that the plaintiffs " are wrong in saying that those were emergency operations, " but one must nevertheless see what were the facts, and it seems " to me that the first payment, made by cheque on April 23 and " acknowledged on April 30, was a cheque . . . being payment " ' for demolition of faulty structure,' and no licence was in " existence at that time; no licence was ever in existence to " demolish the rear wall. That payment was made for the work " done, but it does not seem to me that the defendant can say " that he seeks, in spite of the facts, to take that payment away " from that date and relate it to the later period. The same " applies, in my judgment, to the next cheque, the cheque for " £500 paid on June 11 and acknowledged on June 15, the " plaintiffs saying: ' We thank you for your cheque value £500 " ' on account of work carried out at the above.' "

I am bound to say that I feel a difficulty about that decision. It seems to me that as a matter of law the nature of these payments must be sought in the contract under which they were made. The fact that words are put in the receipt which might indicate an intention to appropriate, does not seem to me to be enough to deprive the payment of the character it had derived from the contract, unless, of course, there had been some oral or written agreement between the parties to that effect—and that is not suggested here. The mere fact that the defendant did not object to the words on the receipt does not seem to me to be enough. He was interested only in getting a receipt. It is to be noted that the receipts were sent some time after the payments, and, at any rate the first payment was made, practically before work was started. Where periodical payments are made under contracts of this kind, there is nothing, in the absence of express provision in the contract, which restricts their use to the work actually in operation. They can be used, for instance, for the purchase of materials required for future operations.

I do not think, therefore, that the wording of the receipt is sufficient to enable the plaintiffs to say that these payments should not be treated as payments generally on account of the contract. Nor do I think that it is sufficient to enable them to say that the work in fact being done at that time was not only unlicensed work but work for which a licence was never obtained.

We are concerned here only to apply the law, but I think, for myself, that the plaintiffs (who, after all, are builders and should be very familiar with the licensing provisions) had only themselves to blame if they took the view that all that work could be done as emergency work without a licence. I think that the defendant is right in saying that these payments must be treated as payments under the contract as a whole and must be allocated to his credit in respect of such a sum as the plaintiffs can lawfully claim from him. To that extent, in my view, the appeal should be allowed.

Denning L.J. Builders, when they undertake building work, ought to see the licence before they start the work. It is no use their relying on the word of the owner that he has obtained a licence, because if it should turn out that he has not got one, the work will be illegal and they will be unable to recover payment for it: *J. Dennis & Co. Ld.* v. *Munn.*[2] They can charge him with fraud; but that is a very serious charge to make and one which may very likely fail. Everyone knows that the builder usually makes himself responsible for getting the licence and does not in fact rely on the owner.

In this case the builders pulled down a wall and rebuilt it without a licence. They then got licences for altering the rest of the house at a cost not to exceed £3,200. Later they claimed payment not only of the £3,200 for the licensed work, but also some £1,700 for the cost of the unlicensed work. They sought to say that it was emergency work which did not need a licence. They failed on that point. They next sought to say that the owner had assured them that he held a licence for it and that he had been guilty of fraud. They failed on that point also. Defeated on those two points, they then said that the owner, in the early days of the contract, while only the unlicensed work was being done, had paid them two sums of £500; and they claimed to appropriate those sums to the unlicensed work. They succeeded before the judge on that point. This means that they have got payment, not only of the £3,200 for the licensed work, but also of £1,000 for the unlicensed work. The important question in this case is: how far can a builder appropriate payments to unlicensed work? I wish to thank Mr. Morris for his argument, which he put very fairly on both sides and which has been of great assistance.

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[2] [1949] 2 K.B. 327.

Take, first, a case where all the work done was unlicensed, and part payments have been made. In such a case the builder cannot recover the balance due to him and the owner cannot recover any payments which he has made. Both have been parties to an illegal transaction, and the law will not give its help to either of them. Then take a case where one part of a work is unlicensed and the other part is licensed. In such a case I think that it is plain that any payments made by the owner, generally on account of the work, must be allocated to the lawful part of it; it is not permissible for the builder to appropriate them to the unlawful part. But if the owner himself specifically appropriates a particular payment to the unlawful part, then it remains where it is. He cannot turn round afterwards and appropriate it to the lawful part. Just as the builder cannot recover the balance due to him for the unlawful part, so, also, the owner cannot recover any payments he has made specifically on account of it. He cannot do it directly by action, nor can he do it indirectly by altering his appropriation from the unlawful to the lawful part.

In these circumstances the sole question in this case is: were these two sums of £500 paid generally on account, or were they paid specifically in respect of the unlawful work? On the facts found by the judge, I think that they were made generally on account. They were not appropriated by the owner to any particular work. The builder sought, at the time, to appropriate them to the unlawful part. That he cannot be allowed to do. It is true that the owner took no objection; but that does not matter. The builder knows, or ought to know, the position about the licences better than the owner; and he cannot be allowed to circumvent it by appropriating the payments to the unlawful part, no matter at what stage he does it. Nothing less than a specific appropriation by the owner will suffice. I agree with my Lord, therefore, that this appeal should be allowed to that extent.

Romer L.J. I also agree, and have nothing to add.

Appeal allowed.
Sum awarded reduced to £858 12s. 6d.

Solicitors: *Pritchard Englefield & Co., for Chamberlain, Martin & Spurgeon, Bognor Regis.*

LEE *v.* THE SHOWMEN'S GUILD OF GREAT BRITAIN.

[1950 L. 175]

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Mar. 20,
21, 24;
Apr. 4.

Somervell,
Denning and
Romer L.JJ.

Trade union—Contractual force of rules—Expulsion of member—Rules of union—Jurisdiction of court—Right to work.

The area committee of a trade union of travelling showmen granted to one of its members the right to return to his pre-war site at a fairground, under the provisions of a war emergency rule. Another member, the plaintiff, to whom the particular site had been allotted by the local corporation, refused to accept the committee's ruling, and stood on the site in 1949, basing his claim inter alia on a by-law of the regional section of which he was a member. The rival claimant thereupon laid a complaint before the committee, charging the plaintiff under a rule prohibiting specific kinds of unfair competition between members in relation to sites at fairgrounds.

The committee heard the dispute and decided against the plaintiff, fining him under a rule which empowered area committees to impose fines and other penalties on members who broke any of the rules. By the same rule, a member who failed to pay such a fine was deemed to have ceased to be a member.

The plaintiff did not pay the fine, and was accordingly expelled, with the result that he was deprived of the right to earn his living as a showman on fairgrounds in the United Kingdom controlled by the trade union.

In this action he challenged the validity of the committee's actions, and sought injunctions to restrain the union from expelling him and from publishing in the trade newspaper a statement that he was no longer a member. The trial judge made declarations that as the plaintiff's conduct could not amount to unfair competition, he had not broken the relevant rule and that the committee's decisions were wrong in law, ultra vires the rules, and void; and granted the injunctions asked for.

On appeal by the defendant union:—

Held, that on the true construction of the rule under which the plaintiff was charged, his conduct could not be unfair competition and that the fine and expulsion were ultra vires and void.

The principles on which the courts will intervene in decisions of domestic tribunals considered.

Decision of Ormerod J. affirmed.

[Reported by Miss M. M. Hill, Barrister-at-Law.]

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APPEAL from Ormerod J.

The defendants were an association of travelling showmen, registered under the Trade Union Acts. Their rules provided for the central and area management of the ten sections covering the United Kingdom, and were set out in The Showmen's Year Book, an annual publication.

The plaintiff, Frank Lee, was a member of the Yorkshire section, and his show was a roundabout known as a Noah's Ark. Another member of the same section, William Shaw, who also had a Noah's Ark, had from 1938 to 1943 occupied (or "stood "on") site No. 2, a well-situated position at the annual Bradford Summer Fair. In 1944 he sublet it to another member, but in 1945 he made no claim to the site, as his show business had been dislocated by war conditions.

In 1945 the plaintiff applied, according to the practice of members, to the Bradford Corporation for a site at the current summer fair, and was allocated site No. 2. He stood on it in that year, and again in 1946. There was no fair in 1947.

In 1947 Shaw applied to the area committee for the right to return to site No. 2. He did so under a wartime rule, 26, which provided as follows: "(i) All members of the Guild shall "have the option of again taking up their pre-war positions at all "fairs at the termination of the present war, or before, providing "that the section committees are satisfied that such claim is "justifiable."

His application was granted on August 21. The plaintiff lodged a complaint against the decision, relying in his turn on a by-law of the Yorkshire section, made in 1941, which provided that no member should apply for a site which another member had occupied for two immediately previous consecutive years; and he also submitted that rule 26 did not apply to Shaw because he had not been on war service; but the committee confirmed the decision in favour of Shaw.

In 1948 both the plaintiff and Shaw arrived at Bradford and laid claim to site No. 2. After discussion the plaintiff allowed Shaw to occupy the site, without prejudice to his own claim.

In 1949, the plaintiff, to whom site No. 2 had again been allotted by the corporation, arrived at the fairground before Shaw. He built up his show on the site, and declined to move, in spite of efforts by the committee to settle the dispute.

Shaw thereupon lodged a complaint in writing against the plaintiff, in the following terms, so far as material: "(2) I also "herewith wish to make the following two complaints against Mr. "Frank Lee; one under rule 15 (*c*): he occupied my Noah's Ark "position with his Noah's Ark at Bradford Fair, July, 1949, "knowing the same had been given to me under rule 26, as he "lodged an appeal against the section's decision and the section's "decision was upheld, and I occupied the position in 1948 with "my Noah's Ark which had been granted to me. (3) I also wish "to make a complaint against Mr. F. Lee under Standing Order "No. 3 re Bradford Fair, July, 1949, that he did violate the appeal "committee's decision by occupying my Noah's Ark position with "his Noah's Ark after I had been granted same by the appeals "committee. He occupied the same position after having been "asked three times whether he intended occupying the same by "the Yorkshire sections committee, and each time he said he was "going to occupy same; this was before he started to build up."

The rule referred to—rule 15 (*c*)—provides as follows: "No "member of the Guild shall indulge in unfair competition with "regard to the renting, taking or letting of ground or position. "Where, however, a ground is usually put up for tender or open "competition and is advertised in The World's Fair newspaper "and the lessee of such ground or position allows the previous "tenant to occupy such ground or position at the old rate or price "this shall not be considered as being unfair competition. Any "offer of a payment or price for any ground or piece of ground "or position which is an increase on the price paid immediately "prior to the date of the offer shall be considered unfair competi"tion, and the prevailing price for any ground or piece of ground "or position shall be the price paid immediately prior to the date "of the offer. Should circumstances arise, however, over which "a member has no control which necessitate him making an "increased offer over the price last paid for the ground or piece "of ground or position the member shall lay the facts before his "section committee before making any such offer, and the sec"tion committee shall have power to sanction such an increased "offer if they think it is necessary in the circumstances."

The matter came before the Yorkshire section committee, which heard both parties to the dispute, and decided in favour of Shaw. On August 14, 1949, under the provisions of rule 14 (*a*), they imposed a fine of £100 on the plaintiff.

Rule 14 (*a*), so far as is material, runs: "For the more "efficient working of the Guild, the committee of each section "shall have power to impose fines, penalties, conditions or any "other decision upon any of its members who wilfully or otherwise "break, evade or violate any of the provisions contained in "the rules or any of the regulations or by-laws imposed upon "them. The fines, penalties, conditions or other decisions shall "be in proportion to the nature of the offence committed, but no "fine or penalty shall exceed the sum of £250 in addition to such "costs as may have been incurred in connexion therewith by the "section committee. Should the fine or penalty not be paid, or "the condition or decision imposed observed within one month "after having been imposed, the member concerned shall be "deemed to have ceased to be a member of the Guild. . . ."

In 1949, at the time of the hearing of the dispute, rule 26 (supra), under which the right to site No. 2 had been granted to Shaw, had been withdrawn from the Year Book. The plaintiff did not pay the fine; accordingly he was deemed to have ceased to be a member, and this was confirmed by the committee on October 12, 1949.

The plaintiff applied to the court for declarations, inter alia, (i) that the decision of the committee to prefer Shaw's claim to his own was ultra vires and void, and (ii) that the decision to fine him under rule 14 (*a*) and the consequent expulsion were wrong in law and void; and he asked for injunctions to restrain the defendants from excluding him from membership and publishing in The World's Fair newspaper a statement that he was no longer a member.

Before the trial judge, the defendants were asked to specify which rule had been broken, evaded or violated by the plaintiff so as to give the committee jurisdiction to fine and expel him under rule 14 (*a*), and replied: "Rule 15 (*c*) or rule 6." Rule 6 is not here material.

Ormerod J. held that while the committee's decision in favour of Shaw's rights under rule 26 (later withdrawn) was correct, their decisions to fine and expel the plaintiff were wrong in law, ultra vires the rules, and void, since his Lordship could not say that the plaintiff's conduct amounted to unfair competition such as to bring him within rule 15 (*c*). His Lordship made declarations to that effect and granted the injunctions asked for. The defendants appealed.

Sir Frank Soskice Q.C. and *B. S. Wingate-Saul* for the defendants. If there was power under rule 14 (*a*) to impose the fine, the defendants must succeed on this appeal. If the domestic tribunal acting bona fide could reasonably take the view that the plaintiff's conduct was "unfair competition," the court

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should not interfere, although it might not agree that the committee's view was a true reading in law of the rule: see the judgment of Scrutton L.J. in *Young* v. *Ladies Imperial Club*[1] that the court should not act as a court of appeal from decisions of club committees where these had been properly constituted and summoned, and had decided the matter according to the principles of natural justice; see also Brett L.J. in *Dawkins* v. *Antrobus*[2] to the like effect. Rules of a domestic tribunal need not be construed or applied to the facts as if they were Acts of Parliament or a contract.

[SOMERVELL L.J. What Brett L.J. said does seem to exclude the debating of questions of construction: he said that once there is an argument which might bring the conduct within the rule, the court should not interfere.]

[ROMER L.J. But in both these cases, the decision was based on "the opinion of the committee." That is not so here.]

[DENNING L.J. Social clubs are one thing; but where the issues affect a person's livelihood it may be different. The rules constitute the contract between the members and the guild.]

That was suggested in *Allinson* v. *General Council of Medical Education and Registration*[3]; but in *Leeson* v. *General Council of Medical Education and Registration*[4] the view was the other way; and in *Maclean* v. *The Workers' Union*,[5] which precisely covers this case, Maugham J.[6] preferred the view of Cotton L.J. in *Leeson's* case[7] and held that the court could not interfere to upset a domestic decision reasonably arrived at. That statement of principle is relied on.

[DENNING L.J. But the committee could not extend its jurisdiction by a wrong interpretation of a rule.]

The committee did not go outside the terms of the contract.

[ROMER L.J. *Leeson's* case[7] does not touch this. We are discussing whether the committee exceeded its jurisdiction. Under the Medical Act cases, the question whether a practitioner had been guilty of infamous conduct was a question of fact. Here it is also a question of fact—whether a man has broken a rule. Where do you find exclusive jurisdiction to decide that question vested in the committee? If the rule said: "who in "the opinion" or "in the judgment" of the committee had broken the rule, that would be within the decisions in those cases.

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[1] [1920] 2 K.B. 523, 535.

[2] (1879) 17 Ch.D. 615, 630–1.

[3] [1894] 1 Q.B. 750.

[4] (1889) 43 Ch.D. 366.

[5] [1929] 1 Ch. 602.

[6] Ibid. 621.

[7] 43 Ch.D. 366, 378–83.

But this poses a question of fact. In the medical cases, the whole jurisdiction was vested in the General Council.]

There is no distinction. The Medical Act says "who are "judged." The terms of rule 15 (c) are sufficient for the defendants to succeed without reliance on the authorities. It says: "No member . . . shall indulge in unfair competition with regard "to the renting, taking or letting of ground or position." It is conceded that the list which follows gives some types of unfair competition, but it does not exhaust possible methods of unfair competition; its terms are wide and general. The relevant facts are that Shaw had acquired rights under rule 26 which were known to the plaintiff but that the plaintiff insisted on occupying the site. That was "unfair." And there was certainly competition for No. 2 site.

Only if no reasonable man could have concluded that the plaintiff's conduct was unfair competition need the authorities cited be relied on; and those cited support the contention against intervention by the court.

Finally, rule 26 was intended to give rights to Shaw which the plaintiff violated. The charge was fairly laid under both rule 15 (c) and rule 26, and power arose accordingly to fine under rule 14 (a).

Though the letter lodging the complaint refers expressly only to rule 15 (c), it must be borne in mind that this is the procedure of a domestic tribunal and not of a criminal court. If a complaining member had to put his finger on the precise rule he alleges has been broken, every member would have to consult a lawyer before he lodged a complaint.

Percy Lamb Q.C. and *F. W. Beaton* for the plaintiff. The expulsion will stop the plaintiff from earning his living as a showman. No complaint was made below under rule 26; the expulsion could not have been based on it, for it had been withdrawn from the Year Book in 1949, when the dispute was heard.

[SOMERVELL L.J. But a withdrawal of the rule is not a withdrawal of rights acquired under it.]

No; but the committee could not consider an "evasion" or "violation" of rule 26, because it was no longer in the book.

Rule 24 fixes the power to alter the rules in the members, and not in the committee. That confirms the comment of Denning L.J. that the rules constitute the contract between the members and the guild; and their contractual nature must be borne in mind when they are being enforced.

All the authorities cited were cases involving bad faith, bias, absence of natural justice, or similar matters; none were on the construction of the rules. The question here is whether the fine was properly imposed under rule 14 (*a*). It is not a matter of evidence, but of construction of the rules.

[DENNING L.J. And that is a matter of law which this court can consider; and if it is on admitted facts, it may be proper for the court to interfere.]

The decision in *Andrews* v. *Mitchell*[8] applies to the facts here. The rule conferring power to fine comes into operation only if it is proved that the member has "broken . . ." any of the rules. The court can inquire whether the facts proved amount to a breach of the rules. Sir Frank Soskice argues that if the tribunal honestly believed it had come to a right conclusion, the court can never inquire, unless there has been some act contrary to natural justice. *Dawkins* v. *Antrobus*[9] and *Maclean* v. *The Workers' Union*[10] support the plaintiff here. Once the court is satisfied that the decisions of the tribunal are intra vires the tribunal, it has no right to sit on appeal. But to ascertain the power, one must look at the rules from which the power springs. Where a rule leads to expulsion, there must be a clear charge—a man must know what rule he is said to have broken. Unless the rules provide otherwise, the court should interfere if it concludes that on the admitted or proved facts the rule could not on any proper construction apply.

[ROMER L.J. Are you now saying that the tribunal could be the final court on fact but not on construction? Surely it is either the unappealable court on the entire question, or it is not. How do you separate construction from fact?]

[SOMERVELL L.J. It is a fine but important line. It seems right to lay down a general principle that there should be an appeal on construction but not on fact. But Bowen L.J. in *Leeson's* case[11] suggested that if there was a real argument either on construction or on the facts, it must be left to the tribunal.]

[DENNING L.J. There are many cases of mixed law and fact, and it may be that if the facts are not reasonably capable of being fitted into the rule, the committee has misconstrued the rule.]

That is my submission. It seems implicit in all the cases referred to. Ormerod J. applied the right test. He read the rules, asked counsel which rule was broken, was referred to rule 15 (*c*), construed that rule, and said: "It has not been broken."

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[8] [1905] A.C. 78.

[9] 17 Ch.D. 615.

[10] [1929] 1 Ch. 602.

[11] 43 Ch.D. 366, 384.

[Somervell L.J. When one talks of a contract under rules like these, how does one get over the difficulty that the members have agreed that the tribunal shall construe the rules?]

[Romer L.J. They may have that power, but if they construe wrongly and someone is expelled, he is entitled to come to the court.]

Lord Buckmaster and Lord Wrenbury in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* [12]—a trade union case—support that view. Their examination was not restricted to the union's decision but extended to the construction of the rules.

In *Braithwaite's* case [12] it was held that the court could intervene on construction. That is the true rule. If there is a wider rule that the court will not intervene if it could reasonably be said that the member's conduct could come within the rule, that may apply to the social club cases; but trade union cases, where a man may lose his livelihood if expelled, are different.

[Somervell L.J. But surely the doctors in the medical cases were in similar peril; yet the court would not interfere.]

Those cases were decided before the House of Lords decided *Braithwaite's* case.[12]

Soskice Q.C. in reply. The contention is accepted that you must construe the contract to find out if it confers jurisdiction on the committee. *Braithwaite's* case [12] is distinguishable because there no committee ever acted. Here the committee was charged with the responsibility of determining whether an offence had been committed and whether a fine should be imposed. The point narrows down to which of the two interpretations of rule 15 (*c*) is right.

[Romer L.J. If you are wrong on 15 (*c*) the committee has expelled a member who has not broken a rule. You say you have implicit power to do so. You must have clear language for that.]

Where there is an ambiguity, the matter must be looked at secundum subjectam materiam. This is an attempt by laymen to settle their domestic disputes and achieve finality in a domestic forum. The contract, properly construed, sets up a tribunal to decide whether an offence has been committed. It decided this reasonably, in good faith. The decision should not be interfered with by the court.

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[12] [1922] 2 A.C. 440, 446–53, 467–71.

Cur. adv. vult.

April 4. SOMERVELL L.J. stated the facts, read the rules so far as relevant, and continued:—In this class of case it seems to me plain that the nature of the complaint should be clearly stated, and paragraph 2 of the letter of complaint seems to me to satisfy that test. The standing order referred to in paragraph 3 deals with appeal sub-committees and throws no light on the nature of the charge. It is on the face of it a charge that the plaintiff had violated a decision of the appeal committee. That does not, in my opinion, come within rule 14. Sir Frank Soskice, for the defendant, submitted that it should be regarded as a complaint of violating rule 26. There are two difficulties about this. First, it does not so state. Second, by this time rule 26 had ceased to exist as a rule, though it is not suggested that rights acquired under it did not remain in force. We were referred to the definition of rules in rule 30. That does not, in my view, assist the argument. It was suggested that the violation of a committee's decision might be brought under rule 6. I express no opinion about that, because plainly there was no charge as to a breach of rule 6. In my opinion the only charge that falls to be considered is for a breach of rule 15 (*c*).

Before the judge the case seems to have proceeded on the basis that that was a question for him on the facts, which were really not in dispute. Before us, Sir Frank Soskice suggested, relying on a number of statements in reported cases, that the committee's decision on the matter was final if, whatever the view of this court, the facts were such that the words of the rule might be applicable. I am very shortly summarizing the argument, to which I will return. I will read the passage in which the judge dealt with this point: "Because the plaintiff in 1948 "without prejudice allowed Shaw to have the use of this site, "and because he properly thought he was entitled to it in 1949 "and insisted on having it, I am asked to say that conduct of "that kind amounts to unfair competition to bring him within "rule 15 (*c*) of these rules. Even if that were all that the rule "said, I think that I should have the greatest possible difficulty "in finding that the action taken by the plaintiff on the occasion "when the complaint arose was action which came within the "wording of rule 15 (*c*); but I doubt very much whether, on a "reading of the whole of subrule (*c*) of that rule, it applies to or "is intended to apply in any way to conduct of this kind. It "appears to me that it is intended to apply almost entirely, if "not entirely, to questions arising in the course of either under-"cutting, on the one hand, or bribery by offering an increased "rent on the other hand, and not unfair competition in the sense "of one man saying: 'whatever the committee's decision, I am "'entitled to the use of this site.' How that can be held, how I "could hold, or any other court could hold, that the conduct of "the plaintiff under these circumstances came within that rule I "find it impossible to think, and I am satisfied it did not come "within that rule."

Sir Frank Soskice submitted that that was wrong. He put it in this way. He said rightly that the plaintiff and Shaw were competitors. There was competition for No. 2 site, which was no doubt the better site. The plaintiff in insisting on its use, notwithstanding the decision of the committee, was being unfair. Therefore, there was unfair competition. I do not think that if the words "unfair competition" stood alone they are apt to describe what happened here. It is often fallacious in considering the meaning of a phrase consisting of two words to find a meaning which each has separately and then infer that the two together cover the combination so arrived at. The two together may, as here, have acquired a special meaning of their own. In any event, the phrase here has to be read in the context of the rule, and I agree with the judge that so construed it is incapable of being applied to the plaintiff's conduct.

Sir Frank Soskice referred us to some cases relating to the circumstances in which the court will interfere or will refrain from interfering with the decisions of a domestic tribunal. Before I refer to them it is right to say that there is no question here of any breach of what are called the principles of natural justice, still less of malice or bad faith. The plaintiff was heard and the committee made praiseworthy efforts to try to get the trouble resolved.

In considering statements in cases it is important to have in mind what was the subject-matter covered by the rule which was before the court. In *Dawkins* v. *Antrobus*,[13] the court was concerned with the rule of a club which provided that if the conduct of a member was "in the opinion of the committee . . . injurious "to the character and interests of the club," he could, subject to a right of appeal to a general meeting, be expelled. Brett L.J.

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[13] 17 Ch.D. 615.

referred to the danger of the courts acting as courts of appeal from decisions of members of clubs.[14] On those words and on that subject-matter, the court considered, first, whether there was anything contrary to natural justice. Being satisfied that there was not, they then, as I read the judgments, proceeded on the basis that, being satisfied that the decision was bona fide, the court would not further examine into the matter, although two of the Lords Justices indicated that they thought that the decision was reasonable. Although, of course, any rule or formula involves in one sense construing the words used, the question here was the opinion of a body of men on a question of the standards of propriety and conduct appropriate to members of a particular association. In considering in such a case whether the committee has acted intra vires, they will perhaps inevitably have done so if they have acted bona fide.

In *Leeson* v. *General Council of Medical Education and Registration*[15] and *Allinson* v. *General Council of Medical Education and Registration*[16] this court had, inter alia, to consider the words of section 29 of the Medical Act, 1858: "If any registered medical "practitioner . . . shall, after due inquiry, be judged by the General "Council to have been guilty of infamous conduct in any profes"sional respect, the General Council may, if they see fit, direct the "registrar to erase the name of such medical practitioner from the "register." There are words in the judgment of Cotton L.J.[17] which suggest that, subject to the principles of natural justice, the court would only interfere if satisfied that the council had not acted honestly. Bowen L.J. proceeded on the same lines.[18] Sir Frank Soskice relied on those judgments. In the later case the test is, as I read it, put more objectively. Lord Esher M.R. said[19]: "Was the evidence, taken as a whole, reasonably capable "of being treated by the council as bringing the plaintiff within "that definition of 'infamous conduct in a professional respect'?" Lopes L.J. held that the court would not interfere if there was any evidence on which the council could reasonably have come to their decision.[20] Davey L.J. put it in the same way at the conclusion of his judgment.[21] In those cases the question was not primarily one of construction but of professional ethics.

In *Maclean* v. *The Workers' Union*[22] Maugham J. had to

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[14] 17 Ch.D. 615, 630–1.
[15] 43 Ch.D. 366.
[16] [1894] 1 Q.B. 750.
[17] 43 Ch.D. 366, 379–80.
[18] Ibid. 383.
[19] [1894] 1 Q.B. 750, 761.
[20] Ibid. 763.
[21] Ibid. 766.
[22] [1929] 1 Ch. 602.

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consider a case in which the plaintiff had been expelled for committing a breach of the rules. The plaintiff maintained that in the circumstances of the case the committee could not be impartial. The plaintiff had attacked the committee. There was a long history of previous disputes. They were therefore, it was said, biased in their conclusion to expel him and their decision was void. Maugham J.[22] reviewed the decisions. He preferred the statements in *Leeson's* case [23] to those in *Allinson's* case.[24] With respect, I prefer the latter, though, it may be, on the subject-matter being considered in those cases the distinction is one without a difference. If a committee have held that A is established when there was no evidence on which they could so find, I think that the court should interfere although they, the committee, may have honestly misconstrued the provisions under which they were purporting to act. The issue as raised in *Maclean's* case [22] does not, of course, arise in this appeal.

The decision in *Young* v. *Ladies' Imperial Club* is as such of no assistance. Scrutton L.J.[25] stated that this court is not a court of appeal from the decisions of club committees, "provided "the committees are properly constituted and properly sum-"moned, and deal with the matter in a way not contrary to the "principles of natural justice." I am sure the Lord Justice did not intend to exclude the rules in considering the question whether the committee had acted ultra vires.

In *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite and Others* [26] the House of Lords, after disposing of the first defence based on section 4 of the Trades Union Act of 1871, proceeded to consider a defence based on the construction and application of the rules. Although it would appear that a committee had regarded a breach of one of the rules as proved to their satisfaction, it would seem, at any rate to me, that they were a committee acting in an executive capacity and not as a domestic tribunal deciding a charge after hearing the party or parties charged. In any case, there appears to have been no direct issue on the point which we have to consider.

These cases, in my opinion, show that, even where the subject-matter is as it was in the medical cases, the courts will interfere if there is no evidence. In such a case the committee will have acted ultra vires. That, on the conclusion which I have already

[22] [1929] 1 Ch. 602, 621–4.

[23] 43 Ch.D. 366.

[24] [1894] 1 Q.B. 750.

[25] [1920] 2 K.B. 523, 535.

[26] [1922] 2 A.C. 440.

expressed, is sufficient to enable the plaintiff to hold the judgment which he obtained below.

This is a difficult and important branch of the law. I am alive, I hope, to the important and necessary work done by domestic tribunals, normally with care, skill and fairness. I am also alive to the principle, reiterated more than once, that this court cannot be made a court of appeal from decisions of such tribunals. On the other hand, a power of expelling a member is a drastic power which in many cases, as here, may affect the plaintiff's livelihood or reputation. There is, in my opinion, a distinction between cases where the decision challenged is under the rules based on the opinion of a committee on a matter which is primarily one of opinion, and those cases, such as the present, where the decision is, or should be, based primarily on the legal construction of words in a rule. The principles laid down in the former class of case are sufficient for the plaintiff here. I wish, however, to make it clear that, in my opinion, the principles laid down in those cases are not necessarily to be regarded as setting the limit to the jurisdiction of this court where the issue is one primarily of construction.

DENNING L.J. The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.

It was once said by Sir George Jessel M.R. that the courts only intervened in these cases to protect rights of property: see *Rigby* v. *Connol*[27]; and other judges have often said the same thing: see, for instance, *Cookson* v. *Harewood*.[28] But Fletcher Moulton L.J. denied that there was any such limitation on the power of the courts: see *Osborne* v. *Amalgamated Society of Railway Servants*[29]; and it has now become clear that he was right: see the cornporters' case, *Abbott* v. *Sullivan*.[30] That case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood: see *Amalgamated Society of Carpenters, etc.* v. *Braithwaite* [31]; but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced: see *Baird* v. *Wells*.[32] That is, I think, the only relevance of rights of property in this connexion. It goes to the form of remedy, not to the right.

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[27] (1880) 14 Ch.D. 482, 487.

[28] [1932] 2 K.B. 478, 481, 488.

[29] [1911] 1 Ch. 540, 562.

[30] [1952] 1 K.B. 189.

Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. That appears, I think, from the judgments of Brett L.J. in *Dawkins* v. *Antrobus*,[33] of Kelly C.B. in *Wood* v. *Woad*,[34] and of Lord Birkenhead L.C. in *Weinberger* v. *Inglis*,[35] which are to be preferred to the dictum of Maugham J. in *Maclean* v. *The Workers' Union* [36] to the contrary. Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts from their jurisdiction: see *Scott* v. *Avery*,[37] *per* Alderson B.[38] and Lord Cranworth L.C.[39] They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void: see *Czarnikow &*

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[31] [1922] 2 A.C. 440.
[32] (1890) 44 Ch.D. 661, 675–6.
[33] 17 Ch.D. 615, 630.
[34] (1874) L.R. 9 Ex. 190, 196.
[35] [1919] A.C. 606, 616.
[36] [1929] 1 Ch. 602, 625.
[37] (1856) 5 H.L.C. 811.
[38] Ibid. 845.
[39] Ibid. 847.

Co. Ld. v. *Roth, Schmidt & Co.*,[40] *In re Raven*[41] and *In re Wynn.*[42]

The question in this case is: to what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs, the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules; but they will not otherwise interfere: see *Labouchere* v. *Earl of Wharncliffe*[43] and *Dawkins* v. *Antrobus.*[44]

It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.

But the question still remains: to what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal has observed the law. This includes the correct interpretation of the rules. Let me give an illustration. If a domestic tribunal is given power by the rules to expel a member for misconduct, such as here for "unfair competition," does that mean that the tribunal is the sole judge of what constitutes unfair competition? Suppose it puts an entirely wrong construction on the words "unfair competition" and finds a member guilty of it when no reasonable person could so find, has not the man a remedy? I think that he has, for the simple reason that he has only agreed to the committee exercising jurisdiction according to the true interpretation of the rules, and not according to a wrong interpretation. Take this very case. If the man is found guilty of unfair competition, the committee can impose a fine on him of a sum up to £250. Then if he has not the money to pay, or, at any rate, does not pay, within one month, the man automatically ceases to be a member of the guild: see rule 14. To be deprived of membership in this way is a very severe penalty on a man. It means that he will be excluded from all the fairgrounds of the country which are controlled by the guild or its members: see rules 11 (*g*) (ii) and 15 (*a*). This is a serious encroachment on his right to earn a livelihood, and it is, I think, not to be permitted unless justified by the contract into which he has entered. The courts have never allowed a master to dismiss a servant except in accordance with the terms of the contract between them. So also they cannot permit a domestic tribunal to deprive a member of his livelihood or to injure him in it, unless the contract, on its true construction, gives the tribunal power to do so.

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[40] [1922] 2 K.B. 478, 488.
[41] [1915] 1 Ch. 673.
[42] [1952] 1 Ch. 271.
[43] (1879) 13 Ch.D. 346.
[44] 17 Ch.D. 615, 630.

I repeat "on its true construction," because I desire to emphasize that the true construction of the contract is to be decided by the courts and by no one else. Sir Frank Soskice argued that it was for the committee of the guild to construe the rules, and that, so long as they put an honest construction on them, their construction was binding on the members, even though it was a wrong construction. I cannot agree with that contention. The rules are the contract between the members. The committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, no matter how honest they may be. They have only such jurisdiction as the contract on its true interpretation confers on them, not what they think it confers. The scope of their jurisdiction is a matter for the courts, and not for the parties, let alone for one of them. That is how the House of Lords approached the problem in the *Carpenters'* case,[45] and I think that we should follow their example.

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[45] [1922] 2 A.C. 440.

In most of the cases which come before such a domestic tribunal the task of the committee can be divided into two parts: firstly, they must construe the rules; secondly, they must apply the rules to the facts. The first is a question of law which they must answer correctly if they are to keep within their jurisdiction; the second is a question of fact which is essentially a matter for them. The whole point of giving jurisdiction to a committee is so that they can determine the facts and decide what is to be done about them. The two parts of the task are, however, often inextricably mixed together. The construction of the rules is so bound up with the application of the rules to the facts that no one can tell one from the other. When that happens, the question whether the committee has acted within its jurisdiction depends, in my opinion, on whether the facts adduced before them were reasonably capable of being held to be a breach of the rules. If they were, then the proper inference is that the committee correctly construed the rules and have acted within their jurisdiction. If, however, the facts were not reasonably capable of being held to be a breach, and yet the committee held them to be a breach, then the only inference is that the committee have misconstrued the rules and exceeded their jurisdiction. The proposition is sometimes stated in the form that the court can interfere if there was no evidence to support the finding of the committee; but that only means that the facts were not reasonably capable of supporting the finding.

We were referred to a number of cases on statutory tribunals. These are not directly in point, because a statute can, expressly or by implication, exclude the jurisdiction of the courts, whereas parties cannot do so. Nevertheless, in cases where the jurisdiction is not excluded, the courts have intervened on the same principles as I have mentioned. The cases show that, although Parliament has given a tribunal power to deprive a man of his livelihood for a particular cause, nevertheless the courts will intervene if there is a real substantial miscarriage of justice with regard to him; and they will hold that there is a miscarriage of justice if the facts adduced before the tribunal are not reasonably capable of supporting the charge made against him. Thus where an Act stated that a tribunal might remove a registrar for "any cause which "may appear reasonable to the tribunal," all the judges were of opinion that the courts would take care to see that the cause was a real and substantial cause. There must, it was held, be sufficient evidence to go to a jury on it: see *Osgood* v. *Nelson.*[46] So, also, when the General Medical Council were empowered to remove a medical man for "infamous conduct," it was held by this court that the facts before them must be reasonably capable of being so considered: see *per* Lord Esher in *Allinson* v. *General Council of Medical Education and Registration.*[47] It has sometimes been said in these cases that absence of evidence is not itself a ground for the intervention of the court, but only goes to show bad faith in the tribunal: see *Leeson* v. *General Council of Medical Education and Registration* [48] and *Maclean* v. *The Workers' Union* [49]; but I do not think that those statements can stand in the light of *Osgood* v. *Nelson,*[50] which was not cited to the court in either case.

Those cases, it is true, concerned statutory tribunals, but I see no reason why the powers of the court to intervene should be any less in the case of domestic tribunals. In each case it is a question of interpretation, in the one of a statute, in the other of the rules, to see whether the tribunal has observed the law. In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction. The remedy by certiorari does not lie to domestic tribunals, but the remedy by declaration and injunction does lie, and it can be as effective as, if not more effective than, certiorari. It is, indeed, more effective, because it is not subject to the limitation that the error must appear on the face of the record.

My conclusion, therefore, is that the court has power in this case to intervene in the decision of the committee of the Showmen's Guild if no facts were adduced before them which could reasonably be considered to be "unfair competition" within rule 15 (*c*), which says that "no member of the guild shall indulge in "unfair competition with regard to the renting, taking, or letting "of ground or position." The facts are not in dispute. In May, 1949, the plaintiff and Shaw applied to the Bradford Corporation for a site on the fair ground for the Bradford Moor Fair. No allocations were made by the corporation before the two showmen arrived on the ground; but when they got there, the best position was allotted to the plaintiff. Shaw then claimed that, in accordance with a previous ruling of the guild, he was entitled to the position. The corporation thought that the plaintiff was entitled to it, but they were quite ready to allow the showmen to decide between themselves: but the plaintiff said that, as the corporation had allotted it to him, he was going to stand on it. The judge held that there was nothing of "unfair competition" in the plaintiff's conduct, and I agree with him. It may have been very reprehensible of him not to abide by the previous ruling of the guild. He should have given way to Shaw: but he can hardly be said to have been guilty of unfair competition. There was no undercutting or anything of that sort. He only accepted the position allotted to him and stood on it. Inasmuch as the facts are not reasonably capable of being "unfair competition" it follows that the committee had no jurisdiction to find him guilty of it.

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[46] (1872) L.R. 5 H.L. 636, 646–54.
[47] [1894] 1 Q.B. 750, 761.
[48] 43 Ch.D. 366, 377, 384.
[49] [1929] Ch. 602, 623.
[50] L.R. 5 H.L. 636.

There was another charge suggested, though not clearly made, against the plaintiff—namely, that he failed to observe the previous ruling of the committee which had awarded the site to Shaw. That ruling had been given in June, 1948, under rule 26 of the rules of 1948 and if that rule had been in existence in 1949, it may be that the plaintiff could have been found guilty of evading it. But it was not in existence in 1949. It had been repealed, and it is difficult to see how the plaintiff could be guilty of evading a rule which had ceased to exist. That was, no doubt, the reason why he was not charged with evading it.

The only real question before us is whether, on the admitted facts, the plaintiff could properly be found guilty of "unfair competition" within rule 15 (*c*). I agree with the judge that he could not. I would therefore dismiss the appeal.

ROMER L.J. In the case of trade unions such as the defendant guild the rules constitute a contract which are binding on the members and are enforceable against them. The plaintiff, accordingly, on joining the union, became bound to observe the rules which were for the time being in force and which regulated matters as between the executive and the members and as between the members themselves. That obligation, however, carried with it the corresponding right of remaining a member unless and until he forfeited that right by conduct which, under the rules, justified his expulsion from the guild. In general, this right to continued membership of a trade union is of vital importance to men who join it, and expulsion from the union may well result in the loss to a man of his only known means of livelihood. It is a right which the courts recognize and will not hesitate, in proper circumstances, to protect.

The plaintiff, having been expelled from the defendant guild, comes to what are prima facie the proper tribunals in this country for the redress of grievances—namely, Her Majesty's Courts, and seeks to establish that his expulsion was wrongful and to have his right to continued membership of the guild recognized and affirmed. He was met before us (though not, apparently, before the judge) with the contention that he has no right to resort to the courts on this matter inasmuch as he is bound under the rules to accept as final and binding the decision of the domestic tribunal which adjudicated on his case; and that that tribunal is the sole and decisive arbiter of his fate. The particular provision on which this contention is based is rule 14 (*a*). There can be no question but that the plaintiff, by virtue of this rule, has on the face of it agreed to accept the decision of the relevant tribunal on such matters as properly come within the scope of its jurisdiction. On any question, however, that is outside that scope he is free to come to the courts. The first question, therefore, is whether the decision which resulted in disciplinary action being taken against the plaintiff was or was not one which lay within the exclusive province of the tribunal. I will not restate the controversy which arose at Bradford or the part which the plaintiff played in it. Suffice it to say that he conceived that he had a right under a by-law passed in 1941 to a certain pitch at the fair which was claimed by a man named Shaw, and carried his assertion of that right to the point of defying a contrary ruling by the properly constituted representatives of the guild. A domestic tribunal ("the committee") was convened to consider the affair, and on the facts (which were substantially not in dispute) that tribunal held that the plaintiff's conduct infringed rule 15 (*c*), which forbids members of the guild from indulging in unfair competition. This finding sufficiently furnished (as the committee thought) the necessary condition precedent to action under rule 14 (*a*), and that action, which took the form of fining and subsequently expelling the plaintiff, was accordingly taken. The plaintiff says that the committee's decision was wrong, and I agree with him; but the question for the moment is whether it is open to him to come to the courts and say so.

The question whether a member of a community is in breach of a rule which he has agreed shall be binding on him may be purely factual, or may be one partly of fact and partly of law, or may be one purely of construction of the rule, in which case it is wholly a question of law. In my judgment, the inquiry on which the committee embarked in the present case came within the third of these categories, for no question of fact was really in dispute. There was no doubt about what had happened at Bradford, and it was not the aim of the plaintiff to deny his actions but to justify them. All, therefore, that the committee had to do was to determine whether those actions came within the prohibition imposed on members by rule 15 (*c*). Their primary and only task, accordingly, was to interpret the meaning and effect of that subrule or, as the lawyers say, to construe it.

Did, then, the plaintiff, when he joined the guild, agree to accept as final and binding the decision of the committee on questions that might arise as to the construction of the rules? I leave aside for the moment the question whether he would be bound in law by any such agreement; but did he in fact agree? Such an agreement might have unfortunate, and even disastrous, results. There are few questions in the legal sphere which call for a higher degree of skill and experience than questions arising from the construction of documents. Such problems come almost daily before the courts and can in many cases only be solved by the proper application of principles which have been gradually evolved and of which the average layman has never heard. Even with a knowledge of such principles the task is frequently difficult, and it is one with which a lay tribunal is singularly unfitted to cope. In these circumstances I should require the use of clear language before I was satisfied that members of any body such as the defendant guild had agreed to leave exclusively to a domestic tribunal powers which it had neither the knowledge nor experience to use and which, if misused (however honestly), might have such serious consequences for the members. I can find no such language in rule 14.

The defendants' argument is that any member can be fined and expelled under this rule if he breaks a rule as construed by the committee, even though, on its true construction, he has not broken it at all. The short answer to this contention, as it seems to me, is that rule 14 does not say so. If the rule had provided that members who "in the opinion" or "in the judgment" of the committee broke the regulations, then the plaintiff might, on this aspect of the case, have found himself in a difficulty. That qualification does not, however, appear. The condition precedent to the taking of action under rule 14 is that a member should have broken the rules; and that, in my opinion, means according to what they really mean and not according to what the committee think they mean. It is provided in subrule 4 of rule 14 that the decision of an appeal committee is to be taken as final

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as regards any member who appeals to them, and I am willing to assume (although it does not expressly say so) that the decision of the subordinate committee is also to be final if a member does not appeal. Even so, the condition precedent remains, and there is no sufficient indication in the rule that the committee are to be the final interpreters of the rules which constitute the contract into which the members of the guild have entered. If they attribute to a rule a meaning which it does not bear, and then punish a man for breach of the rule as so construed, they are assuming a jurisdiction which they do not possess if the man has conformed to the rule on its proper interpretation; and I can find nothing in rule 14 to suggest that such a man has contracted out from applying to the court to determine whether, on the true construction of the rule which he is said to have broken, he has broken it in fact.

So far as I am aware, there is nothing in any of the decided cases which conflicts with the view which I have expressed. It certainly does not conflict with what I may call "the club cases" (for example, *Dawkins* v. *Antrobus* [51]). Two elements of importance distinguish those cases from this. First, by the rules in the club cases by which the members agreed to be bound it was expressly provided that the test of expulsion was whether "in "the opinion of" the domestic forum the conduct of a member warranted it; and, secondly, the decisions on which the intervention of the courts was unsuccessfully sought were questions of ethics and not of law. Such questions are peculiarly within the province of the committee of a social club, and it is now well established that the courts will not interfere even with unreasonable decisions provided that the committee have not acted dishonestly or in excess of jurisdiction in arriving at them.

We were also referred to cases such as *Leeson's* case [52] and *Allinson's* case,[53] in which the powers of the medical disciplinary body, the General Medical Council, were under discussion. Such powers are conferred by statute (and not, as in the club cases, by the members themselves), and under them the name of a medical practitioner can be erased from the register if after due inquiry he is judged by the General Council to have been guilty of infamous conduct in any professional respect. Accordingly, as in the club cases, a domestic tribunal, peculiarly qualified for the task, is established, whose duty it is to inquire into questions of conduct and arrive at a conclusion on them. Parliament has entrusted the General Medical Council with this duty in substitution for the courts. Appeals to the courts in the medical cases, as in the club cases, have been in relation to decisions on ethical, not legal, questions; and the considerations which, and which alone, will warrant the intervention of the courts have been stated in not dissimilar terms.

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[51] 17 Ch.D. 615.

[52] 43 Ch.D. 366.

[53] [1894] 1 Q.B. 750.

In truth, I think that neither the club nor the medical cases, nor the grounds on which they were decided, are of much assistance in the present case. The expulsions complained of in those cases depended on matters which lay within the exclusive competence of the domestic tribunals to decide, whereas in the present case the plaintiff's expulsion depended on a matter which, in my view, the committee had no exclusive competence to decide —namely, the interpretation or construction of the rules. Further, in neither the club cases nor the medical cases has the question been raised or decided whether resort to the courts will be entertained where the opinion or judgment of the domestic tribunal has been on a question of law as distinct from a question of personal conduct. Of greater relevance to the present question, I think, are cases in which the courts have exercised their power to adjudicate on rights contractually acquired, notwithstanding the conferment of such power on domestic and untrained bodies. An example of this is the *Amalgamated Society of Carpenters, Cabinet Makers & Joiners* v. *Braithwaite and Others.*[54] In that case the rules of the appellant trade union included a rule (32) which provided that it should be competent for any managing committee, district council, branch committee, or branch at a special quarterly meeting: "to fine . . . or expel any member "from the society upon satisfactory proof that such member . . . "(was) working on a co-partnership system when such system "makes provision for the operatives holding only a minority of "the shares in the concern." The power of expulsion was accordingly exercisable under the rule if it had been proved to the satisfaction of the relevant tribunal that a member was so working. The respondents (members of the society) joined a co-partnership scheme inaugurated by Lever Brothers Ld., and the appellant society issued instructions to the effect that any member of the society who participated in this scheme must be excluded from the society in accordance with the general rules. The respondent obtained from the Court of Appeal (which reversed the decision of Eve J.) a perpetual injunction restraining the

[54] [1922] 2 A.C. 440.

society from expelling them from the society on the ground that their participation in the scheme justified their expulsion under rule 32. Now, although presumably the society, in acting on that rule, found it proved to its satisfaction that the respondents were working on a co-partnership of the nature described in the rule before it issued instructions for the expulsion of the respondents, it did not apparently rely on that fact as a bar to the respondents' action either in the Court of Appeal or in the House of Lords. The society sought to defend the respondents' action partly on the ground that it was precluded by section 4 of the Trade Union Act, 1871, and partly on the ground that rule 32 justified the expulsion. The House of Lords (affirming the Court of Appeal) rejected the contention based on the Act and then proceeded to consider whether participation in the Lever Brothers scheme did or did not transgress the relevant part of rule 32. This (as sufficiently appears from the speech of Lord Wrenbury [55]) was a mixed question of fact and construction, and the House was in no way deterred from considering it merely because of the jurisdiction which the rule gave to the society. Their Lordships in fact decided that question in the respondents' favour and thus in effect overruled the society's decision on the matter. Another decision of the House of Lords which may usefully be referred to in this connexion is *Osgood* v. *Nelson.*[56]

For the above reasons I am satisfied that the plaintiff is in no way debarred from asking the court to say that the committee misconstrued rule 15 (*c*) and from contending that on its true construction nothing that he did at Bradford was in breach of its provisions. I have already indicated that in my opinion the committee did misinterpret the rule, and on this point I entirely agree with the view which the judge expressed. It was argued for the defendant that in asserting his right to the coveted pitch on the fair ground the plaintiff unfairly competed with Shaw in the "taking" of that pitch. In my judgment that is attributing to the subrule an effect which goes far beyond its terms. If A and B claim the right to occupy the same position on a ground it might be said that in a sense they were "competing" for that position. Assuming (though I do not accept the assumption) that that kind of competition was "competition" within the meaning of the rule, when does it become "unfair"? If the appropriate authority decides that A is right, it follows that B is wrong, but it cannot be said that B was unfair in advancing his claim. A

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[55] [1922] 2 A.C. 440, 471–2.

[56] L.R. 5 H.L. 636.

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plaintiff who unsuccessfully sues to establish his title to land may be ill-advised, obstinate or even pig-headed, but it is difficult to see how he could legitimately be charged with unfairness. In the present case, the plaintiff was setting up a claim under the by-law of 1941 in answer to Shaw's claim under rule 26; in that endeavour he failed, but I agree with the judge that his action did not constitute "unfair competition," even if one takes the first sentence of rule 15 (*c*) by itself. When, however, one looks at the rest of the subrule—and the meaning of a part can only be ascertained by a consideration of the whole—it becomes abundantly plain that the prohibition which the rule imposes is against competition of quite a different kind from that which arises when there are rival claimants to a site. Every provision in rule 15 (*c*) which follows the first sentence constitutes an exception to, or qualification of, or an express inclusion in, a general rule. If a general rule is couched in equivocal terms, light may well be thrown on the meaning which it was intended to bear by provisoes that are subsequently engrafted on it. In rule 15 (*c*) the general rule is stated in the first sentence and prohibits "unfair competition" in the renting, taking or letting of ground or position. This is followed by provisions to the effect that certain acts shall not be, and that other acts shall be, regarded as breaches of the general rule. Each of these acts is characterized by the feature of undercutting or bribery, and each of these features is characteristic of the ordinary conception of unfair competition. From this it is a very legitimate inference that the general rule is one which prohibits competition between members by means of undercutting or bribery or by acts analogous thereto. The plaintiff never broke this rule and, as he was never charged with a breach of any other rule, it cannot be postulated of him that he came within that category of members against whom, and against whom alone, the committee, under the provisions of rule 14 (a), had authority to act.

I am therefore of opinion that the plaintiff has not contractually ousted the jurisdiction of the courts to entertain his action and that, in the exercise of that jurisdiction, he is entitled to the relief which was granted to him in the court below. I am accordingly of the opinion that the appeal fails.

I would, however, like to say a word or two as to what the position would have been in my view if the defendants had succeeded in establishing that the effect of rule 14 (*a*) was to vest in the committee the exclusive power of interpreting the rules and that the plaintiff had contractually debarred himself from

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resorting to the courts even though the committee adopted a palpably erroneous construction of a rule. I hesitate to express a concluded view on this point, partly because it does not arise if I am right in thinking that the powers of the committee under rule 14 (*a*) are not such as the defendant claims them to be, and partly because it was not argued before us. It seems to me, however, as at present advised, that on the hypothesis which I have suggested, it is at least possible that the courts would hold that the plaintiff's agreement to accept as final decisions of the committee on the construction of the rules was not binding on him. The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights. As an example of this, it has been held that any attempt by a testator to divert from the courts the power of deciding questions of construction that may arise on his will and vesting that power in his executors instead will fail: *In re Raven*[57]; *In re Wynn*.[58] Directions of this kind by testators will be disregarded, partly on the ground that they are contrary to public policy as being attempts to oust the jurisdiction of the courts, and partly as being repugnant to the benefits conferred by the will on the beneficiaries. If the cases to which I have referred were rightly decided, as I think they were, it may well be that the same considerations of public policy which act as a fetter on testamentary attempts to oust the jurisdiction of the courts on questions of law would defeat contractual attempts to bring about the same result; and more especially, perhaps, where the contract is contained in trade union rules to which members of the union are virtually bound to subscribe. I will only add that passages in the judgments of this court in *Czarnikow & Co. Ld.* v. *Roth, Schmidt & Co.*[59] lend support, as I think, to the view that if rule 14 (*a*) had the force and effect which the defendant has suggested should be attributed to it, the courts would not recognize as binding the attempted ouster of jurisdiction which would be thereby involved.

Appeal dismissed.

Solicitors: *J. H. Milner & Son; Stafford Clark & Co., for G. E. Hutchinson, Huddersfield.*

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[57] [1915] 1 Ch. 673.
[58] [1952] 1 Ch. 271.
[59] [1922] 2 K.B. 478.

REGINA *v.* KENT JUSTICES. *Ex parte* MACHIN.

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Apr. 7.

Lord Goddard C.J., Ormerod and Parker JJ.

Criminal Law—Summary Jurisdiction—Procedure—Defendant's consent to summary trial of indictable offences—Conviction by justices and committal to quarter sessions for sentence—Failure to explain to defendant that he might be committed to quarter sessions—Conviction and committal a nullity—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17*—Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 24*—Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29, *Sch.* 9.

By the Ninth Schedule to the Criminal Justice Act, 1948, there shall be inserted in section 24 (2) of the Criminal Justice Act, 1925, the words "and shall explain to him that he may, if convicted "by the court, be committed to quarter sessions under section 29 "of the Criminal Justice Act, 1948 . . ."

The applicant was charged before justices with indictable offences; he was asked if he consented to be dealt with by the justices but it was not explained to him that he might, if convicted, be committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948. The applicant consented to be dealt with by the justices who convicted him and committed him to quarter sessions for sentence. On an application for an order of certiorari to bring up and quash the convictions and the committal:—

Held, that the justices in failing to explain to the applicant that he might be committed to quarter sessions for sentence had failed to comply with the statutory provisions which alone give them power to try indictable offences; and that therefore, although the applicant had consented, the justices had had no jurisdiction to deal with him. The convictions and the subsequent committal were, accordingly, bad.

Reg. v. *Cockshott* [1898] 1 Q.B. 582 followed.

Rex v. *Norfolk Justices* [1950] 2 K.B. 558 distinguished.

Application for an order of certiorari.

On August 29, 1951, the applicant was charged before the Kent justices, sitting at Herne Bay, with the offences of having obtained credit by fraud and of larceny of two fountain pens. At the hearing the justices asked the applicant if he consented to being tried by them summarily, and through his solicitor he gave his consent. When he was asked if he consented to a summary trial it was not explained to the applicant that he might, if convicted by the court, be committed to quarter sessions for sentence. After the convictions, on being told of the applicant's character and antecedents and that he wished four other offences to be taken into consideration, the justices, purporting to act under the powers contained in section 29 of the Criminal Justice Act, 1948, committed the applicant to quarter sessions for sentence.

Before quarter sessions objection was taken that the convictions were bad and the applicant was remanded in custody pending the result of the present application, by which the applicant sought an order of certiorari to bring up and quash the adjudication of the justices whereby he was convicted and committed to quarter sessions for sentence, on the ground that the committal was bad in law in as much as the court did not explain to him that he might be so committed, contrary to section 24 of the Criminal Justice Act, 1925, as amended by Sch. IX to the Criminal Justice Act, 1948.[1]

K. G. Jupp for the applicant. The applicant was charged with indictable offences which, apart from section 24 of the Criminal Justice Act, 1925, the justices had no power to try. Subsection (1) of section 24 gives the justices a specific power, but they can only take advantage of it in the manner set out in subsection (2), and it is submitted that they must comply with the provisions of subsection (2) and do all the things that it requires them to do before asking a prisoner if he consents to a summary trial. The ninth schedule to the Criminal Justice Act, 1948, adds a requirement that the justices shall explain to a prisoner that, if convicted by them, he might be committed to quarter sessions for sentence. No such explanation was made to the applicant before he was asked if he consented to a summary trial.

In any event, by the effect of section 24 (3) of the Criminal Justice Act, 1925, and section 27 (1) of the Summary Jurisdiction Act, 1879, the Summary Jurisdiction Act, 1879 applies to the summary trial of an indictable offence under the Act of 1925. By the ninth schedule to the Criminal Justice Act, 1948, the same requirement of explanation to the prisoner is repeated in section 17 of the Summary Jurisdiction Act, 1879.

It is submitted that this requirement is a peremptory direction which must be complied with before asking the prisoner if he consents to a summary trial, and that unless it is complied with a subsequent conviction is bad.

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[1] Criminal Justice Act, 1948, Sch. IX: "In section 24 of the Criminal "Justice Act, 1925, . . . in subsection "(2) after the words 'if tried by a "'jury' there shall be inserted the "words 'and shall explain to him "'that he may, if convicted by the "'court, be committed to quarter "'sessions under section twenty-nine "'of the Criminal Justice Act, 1948 "'. . .'"

Reg. v. *Cockshott* [2] shows how strictly the court regards provisions such as these; that case was decided under section 17 of the Summary Jurisdiction Act, 1879, which is a similar section to section 24 of the Criminal Justice Act, 1925, and it is submitted is authority for saying that every statutory requirement must be complied with. [*Rex* v. *Latham* [3] referred to.]

If the justices are acting under subsection (1) of section 24 of the Criminal Justice Act, 1925, they must do so subject to the provisions of subsection (2) because subsection (1) expressly states that it is subject to the provisions of the section; subsection (2) contains the provisions requiring an explanation to be made to the prisoner that he may be committed to quarter sessions, and it is submitted that if that explanation was not made the justices had no jurisdiction and there was no proper conviction. In acting under section 24 (1) the justices had power to commit to quarter sessions if there had been a proper conviction; here the justices had not got jurisdiction, and it is submitted that the nullity went to both the conviction and the committal. *Rex* v. *Norfolk Justices* [4] can be distinguished.

T. K. Edie for the Crown. Section 17 of the Summary Jurisdiction Act, 1879, is not relevant to this case; it is section 24 of the Criminal Justice Act, 1925, which must be considered. That section can be read so that the provision for warning the prisoner that he may be committed to quarter sessions only applies to cases coming within subsection (2), but it must be admitted that subsections (1) and (2) are both concerned with similar offences and it would be curious if the warning was necessary in a case coming under subsection (2) and not in the case of one coming under subsection (1).

If there is a statutory obligation on the court to warn a prisoner of the powers of the court under section 29 of the Criminal Justice Act, 1948, and if that step is not taken, then it is admitted that it must go to the jurisdiction of the magistrates; the point would then arise whether or not the prisoner was ever in peril on the charge and whether he might be re-arrested. [*Rex* v. *Wandsworth Justices* [5] and *Rex* v. *Norfolk Justices* [6] referred to.]

[2] [1898] 1 Q.B. 582.
[3] (1943) 41 L.G.R. 99.
[4] [1950] 2 K.B. 558.
[5] [1942] 1 K.B. 281.
[6] [1950] 2 K.B. 558.

Lord Goddard C.J. In this case Mr. Jupp moves for an order of certiorari to bring up and quash two convictions which took place before the justices of Kent, sitting in the St. Augustine's Division, when they convicted the applicant, Peter Laurence Machin, of obtaining credit by fraud on August 21 and 24, 1951, and of the larceny of two fountain pens. Obviously the serious case was the first one. The justices convicted and sent him forward for sentence to quarter sessions, purporting to act under section 29 of the Criminal Justice Act, 1948. When the case came before quarter sessions objection was taken that the convictions were bad and quarter sessions held their hand to enable the matter to be argued in this court on an application for an order of certiorari.

The justices' powers of sentence are limited to six months for any particular offence and to not more than 12 months however many offences there may be, but now, if they hear after conviction that a prisoner's character and antecedents are such that they consider their powers of sentence insufficient they can, provided that the provisions of the Summary Jurisdiction Act, 1879, and the Criminal Justice Acts are obeyed, send him forward for sentence to quarter sessions; quarter sessions can then give the same sentence as if he had been convicted on indictment. The difficulty which arose in two cases—*Rex* v. *Sheridan* [7] and *Rex* v. *Grant* [8]—to which I have referred on other occasions can, therefore, no longer arise. Section 29 contains, no doubt, a very useful provision, but on account of it there has been tucked away in one of the schedules—and there are 10 schedules to the Criminal Justice Act, 1948—a provision which adds a requirement to the many requirements already contained in the Summary Jurisdiction Act, 1879, and the Criminal Justice Act, 1925.

It is well known that when a man is brought before a court charged with an indictable offence which can, with his consent, be treated summarily, certain information has to be given to him by the clerk of the court. He has to be told of his right to be tried by a jury; he has to be asked if he desires to be tried by a jury or whether he desires the case to be tried summarily; and when he is given that chance, unless he is a very old offender who knows the curious verdicts which quarter sessions' juries sometimes return, he invariably asks to be tried summarily and endeavours to persuade magistrates to deal with him summarily, because he knows he cannot be given a sentence of more than six months. But still there are those provisions which say what is to be done before the magistrates try an indictable case. The provisions are peremptory because for many centuries in English history an indictable offence could only be tried by a jury and the power of magistrates to try cases of theft and false pretences is purely the creation of statute which hardly existed at all, except in the case of children, before 1879.

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[7] [1937] 1 K.B. 223.

[8] [1936] W.N. 250; 26 Cr.App.R. 8.

In *Reg.* v. *Cockshott*[9] the prisoner had been charged under section 17 of the Summary Jurisdiction Act, 1879, a section which is concerned with offences which prima facie must be tried summarily—a very good illustration of them, I may mention, is an offence under the Merchandise Marks Act, 1887—but which, if the offence carries with it a punishment of more than three months, provides that the prisoner must be told that he can go for trial if he likes; and he has to be told that before the case starts and before he is called on to plead. *Reg.* v. *Cockshott*[9] shows how strictly the court has construed these provisions, because in that case it is quite obvious that what happened was that the solicitor for the prosecution and the solicitor for the defence, who were both present in court and before the justices, had a colloquy in which the solicitor for the defence announced that his client would plead guilty, and therefore no one thought it necessary to tell the man of his right to be tried by a jury. The court held that that would not do, and that the provisions of the statute must be strictly complied with and, as the prisoner had not been told of his right to be tried by a jury before the trial started, the conviction must be quashed.

In this case the relevant section is section 24 of the Criminal Justice Act, 1925. In that section it is provided that if the court is hearing a case which is prima facie indictable but which, by reason of the provisions of the Second Schedule to the Act, can be tried summarily, then when the court decides to try it summarily it will have to reduce the charge into writing, read it to the accused, and then ask him: " . . . 'Do you desire to be " 'tried by a jury, or do you consent to the case being dealt " 'with summarily?' with a statement, if the court thinks such " a statement desirable for his information, of the meaning of " the case being dealt with summarily, and of the assizes or " quarter sessions, as the case may be, at which he will be tried, " if tried by a jury. . . ."

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[9] [1898] 1 Q.B. 582.

That was done in this case. The offences with which this man was charged were offences which the magistrates could try with the consent of the prisoner. There is no question but that he consented. There is no question of any advantage being taken of him because he was represented by a solicitor. The solicitor got up and said: "Yes, my client wishes you to deal with him," and he did not desire to give any explanation. Thereupon the justices were told of his character and antecedents, and were also told that he wanted four other cases taken into consideration, and so they sent him forward for sentence.

Now, as I say, tucked away in one of the schedules to the Criminal Justice Act—it seems to me most unfortunate that it is put into a schedule and not put into section 29, the section giving power to send forward for sentence—it is provided that there must be added to section 24 (2) of the Criminal Justice Act, 1925, the words "and shall explain to him that he may, if "convicted by the court, be committed to quarter sessions under "section twenty-nine of the Criminal Justice Act, 1948, if the "court, on obtaining information as to his character and ante-"cedents, is of opinion that they are such that greater punish-"ment should be inflicted than the court has power to inflict." That was overlooked and it was not explained to the prisoner that he might be so committed.

Following the reasoning of the court in *Reg.* v. *Cockshott*[10] we think we must give effect to that provision, and therefore hold that certiorari must go and these convictions must be quashed. The convictions must be quashed because the justices took upon themselves, although with the consent of the prisoner, to try offences summarily without a strict compliance with the provisions of the Act, which alone allow an indictable offence to be dealt with summarily. It was a very venial offence in the magistrates and one can well understand their overlooking this provision tucked away in the schedule; but the prisoner is entitled to take advantage of it and therefore the committal and the convictions were bad. That distinguishes this case from *Rex* v. *Norfolk Justices*,[11] because there there had been a strict compliance with the section. No one suggested that the section had not been complied with in the sense of machinery. The only thing was, that although the justices had power to convict in that particular case, they had not the power to send forward the case for sentence for reasons I need not go into now, so the committal was bad and that case was sent back to the justices to complete the hearing.

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[10] [1898] 1 Q.B. 582.

[11] [1950] 2 K.B. 558.

In this case we hold that the convictions were bad and therefore the case could not be sent forward for sentence to quarter sessions, because the justices never had jurisdiction to try it because the provisions of the section had not strictly been complied with.

It follows, therefore, that this man has never been technically in peril and he could now be tried over again. But it has been pointed out to us that he has been seven months in custody. Under those circumstances, although it must be a matter for the prosecution—this court has no power to give directions on the matter—we should think it would not be right or necessary, in the interests of justice, to take further proceedings against him for the two offences for which he has been actually convicted, because he has served very nearly the term which he would have served if the justices had dealt with him, and has been in custody seven months, although he has been treated as a prisoner awaiting trial. The four cases outstanding, which have never been made the subject of a charge, although the prisoner wanted them taken into consideration, are not now taken into consideration because the convictions are quashed, and whether the prosecution consider it right to proceed on those charges is a matter for the prosecution and not a matter for this court. We express no opinion about it; all we say is that we do not think it would be right to proceed on these two particular charges where we are quashing the convictions because we think the prisoner has served long enough; and it will be a matter for the prosecution to consider whether they proceed upon the other charges or not.

Ormerod J. I agree.

Parker J. I agree.

Order of certiorari.

Solicitors: *Cunliffe & Airy, for H. W. S. Homewood, Canterbury; County Solicitor, Maidstone.*

J. F. L.

C. C. A.

1952
April 1, 7.

Lord Goddard C.J., Ormerod and Parker JJ.

REGINA *v.* JOHN OWEN.

Criminal Law—Procedure—Witness recalled after jury had retired—Discretion of judge to allow evidence in rebuttal after close of defence—Further evidence after summing-up not permissible.

During the trial of a criminal charge in which the evidence of the prisoner amounted to a complete denial, the jury, after they had retired, sent a message to the judge asking for further evidence on a material issue. The judge allowed the evidence to be given and a witness for the prosecution, who had given evidence but not on that issue, was recalled; the evidence which he gave was not in rebuttal of any matter raised for the first time by the defence and could have formed part of the prosecution's case but in fact no one knew what his evidence would be. Having heard that evidence the jury, after a very short retirement, returned a verdict of guilty. On appeal against conviction:—

Held, that it must be a matter for the discretion of the judge whether to admit evidence for the prosecution after the case for the defence has been closed, but that after the summing-up had been delivered it was too late to allow further evidence to be given, whether by one of the witnesses already called or by a fresh witness, that at that stage the jury may be instructed in reply to any question they may put on any matter on which evidence has been given and that in this case they should have been told that the prosecution had laid before them such evidence as they had thought fit and that fresh evidence could not then be given. The conviction, therefore, could not stand.

Rex v. *Browne* (1943) 29 Cr.App.Rep. 106 followed.

Reg. v. *Frost* (1839) 9 C. & P. 129; 4 St.Tr.N.S. 86, considered.

The rule laid down by Tindal C.J. in *Regina* v. *Frost*, 9 C. & P. 129, 159; 4 St.Tr.N.S. 86, 386, is probably in wider language than would be applied at the present day.

The appellant, John Owen, was tried and convicted before Oliver J., at Chester Assizes, on an indictment containing three counts charging him with carnal knowledge of a girl under 16 years of age; the indictment also contained counts alleging similar offences with two other girls, but during the course of the case these counts were directed to be tried separately.

The appellant, a man of about 70 years of age, was a caretaker at a clinic at Blaenau-Ffestiniog, and it was alleged that on three occasions he took the girl, who was 14 years old, to the clinic, where, in the X-ray or dark room, the offences were committed. The visits to the clinic were said to have taken place at about 3.30 or 4 o'clock in the afternoon when the girl was on her way home from school. At the trial a police inspector, during cross-examination by counsel for the defence, gave evidence to the effect that the clinic was a much frequented place and was visible to some 20 or 30 houses, but he was unable to state the number of patients who often awaited examination there or what were the clinic hours. In answer to the question "Do you know that "doctors work in the clinic and that it is a common sight to see "people waiting about for their turn to go into the clinic?" he replied "Yes." On re-examination he was asked: "Do you "know whether or not the public go into this dark room?" and answered "Not to my knowledge."

When the case for the prosecution was closed the appellant gave evidence, his evidence being a complete denial of the charge, and the judge summed up. After the jury had retired for some time, they sent a message to the judge saying that they wanted evidence as to whether the clinic would be empty or occupied at the material times. The judge was of opinion that the question was of vital relevance which could have been proved by the prosecution as part of their case, and, as he stated in his certificate, "being of opinion that the interests of justice demanded "the evidence, and that the defendant would not be unjustly "prejudiced if I allowed the evidence, I did so." A doctor who had previously given evidence in the case, but merely as to the girl's physical condition, was then recalled, and the effect of his evidence was that at the times when the offences were alleged to have been committed no one, neither doctors nor patients, would be at the clinic unless exceptionally. That evidence having been given, the jury, after a very short retirement, returned a verdict of guilty. The appellant was sentenced to nine months' imprisonment, but leave to appeal was given on the point of law whether the judge was right in allowing the witness to be recalled.

John Jones Roberts for the appellant. The recalling of the doctor after the judge had summed up and the jury had retired, and the admission of his evidence at such a late stage, was an irregularity and is a ground for quashing the conviction. In Archbold's Pleading, Evidence and Practice in Criminal Cases, 32nd ed., at p. 507, it is stated: "In order that injustice should "not be done to a prisoner, the calling of such a witness after "the close of the case for the defence should be limited to cases "where something has arisen on the part of the prisoner, ex "improviso, which no human ingenuity could foresee." Although there may be occasions when additional evidence may be called,

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in criminal cases it may only be called in exceptional circumstances, never where, as in this case, the need could and should have been foreseen by the prosecution. In *Rex* v. *Dora Harris* [1] Avory J., considering the rule laid down in *Reg.* v. *Frost* [2] that a matter arising ex improviso might be answered by contrary evidence on the part of the Crown after the case for the Crown was closed, said [3]: "That rule applies only to a witness called "by the Crown and on behalf of the Crown, but we think that "the rule should also apply to a case where a witness is called "in a criminal trial by the judge after the case for the defence "is closed, and that the practice should be limited to a case "where a matter arises ex improviso, which no human ingenuity "can foresee, on the part of a prisoner, otherwise injustice would "ensue."

[LORD GODDARD C.J. The earlier cases are concerned with the right of the judge to call witnesses; here the jury sent a request for further facts, and the question is whether the judge was entitled to recall the witness.]

In *Rex* v. *Browne* [4] medical evidence was called at the request of the jury after they had retired; there were other factors in that case, but it was considered that the recalling of the witness at that stage was a ground for quashing the conviction. It is submitted that no conviction has ever been upheld where there was this irregularity at the trial; in this case, in particular, where the prosecution could and should have called the evidence during the presentation of their case, the conviction should not be allowed to stand.

Bertrand Richards for the Crown. In Archbold's Pleading, Evidence and Practice in Criminal Cases, 32nd ed., at p. 508, it is stated: "The judge has a discretionary power of recalling "witnesses at any stage of the trial and of putting such questions "to them as the exigencies of justice require, and the Court of "Criminal Appeal will not interfere with the exercise of that discretion unless it appear that an injustice has thereby resulted." The deciding factor is whether injustice has been done; in the present case no one knew what the answer of the witness to the question would be, and it is submitted that there was no injustice. In *Rex* v. *Howarth* [5] a witness was recalled in similar circumstances and the conviction was quashed on the ground that cross-examination and evidence in rebuttal on behalf of the prisoner had not been allowed; no objection was taken to the recalling of the witness. In *Rex* v. *Sullivan*[6] it was said that it was a matter of discretion, and that there was no reason for this court to interfere if the judge had been satisfied that the answer was required in the interests of justice, and if the defendant was not unjustly prejudiced. In that case Avory J.[7] referred to the judgment in *Rex* v. *Crippen*,[8] where Darling J. said: "In arriving at a decision upon that question the judge "ought, no doubt, to have regard to the rule which has been "established by the authorities. But the matter is one which "is within the discretion of the judge who presides at the trial, "who is in a much better position than any court before which "an appeal comes to determine whether it is really fair to allow "the rebutting evidence to be given or not and whether it does "or does not expose the defence to a disadvantage to which it "ought not to be exposed. It does not appear to have been laid "down in any of the authorities that if the judge at the trial "exercises his discretion in a manner different from that in which "the Court of Criminal Appeal would have exercised it, that is "of itself a sufficient ground for granting a new trial or quashing "the conviction."

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[1] [1927] 2 K.B. 587; 20 Cr.App. Rep. 86.

[2] (1839) 9 C. & P. 129, 159; 4 St. Tr.N.S. 86, 386.

[3] [1927] 2 K.B. 587, 595.

[4] (1943) 29 Cr.App.Rep. 106.

[5] (1918) 82 J.P. 152.

In the present case the judge was satisfied that the answer was required in the interests of justice; counsel for the defence was invited to cross-examine the witness and the evidence he gave was evidence in rebuttal of the defence; it is submitted that on the authorities the recalling of this witness is no ground for quashing the conviction. The only authority to the contrary is *Rex* v. *Howarth*,[9] where there was no cross-examination. In *Rex* v. *Crippen*[10] Darling J. said: "We do not feel inclined to "lay down the rule as strictly as Tindal C.J. did in *Reg.* v. "*Frost*.[11] We do not propose to adopt the language of Tindal "C.J. The rule laid down in those terms may, we think, place "an unfair burden on counsel for the prosecution in some cases. "We prefer to express the rule by saying that the rebutting "evidence must in the first place be evidence which is admissible in law. Assuming it to be admissible evidence, it then "becomes a question for the judge at the trial to determine in

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[6] [1923] 1 K.B. 47.

[7] [1923] 1 K.B. 47, 55.

[8] [1911] 1 K.B. 149, 157.

[9] 82 J.P. 152.

[10] [1911] 1 K.B. 149, 157.

[11] 9 C. & P. 129, 159; 4 St.Tr.N.S. 86.

"his discretion whether the evidence, not having been tendered "in chief, ought to be given as rebutting evidence."

Rex v. *Browne*[12] can be distinguished on the facts; there the additional evidence was unrelated to any examination in chief. Here the matter on which the questions were asked arose at the trial and in cross-examination. It is submitted that if evidence can be called, after the defence is closed, it can be called up to the time that the jury have given their verdict.

The court allowed the appeal and quashed the conviction, stating that they would give their reasons subsequently.

Cur. adv. vult.

April 7. LORD GODDARD C.J. The prisoner was charged at the last assizes for Cheshire, before Oliver J., with carnal knowledge of a girl under the age of 16, and was convicted and sentenced to nine months' imprisonment. The judge granted a certificate to enable him to appeal, the point of law that arises being whether he was right in allowing a witness to be recalled after the summing-up and after the jury were enclosed to answer a question which the jury put to the judge. Although the notice of appeal raises certain other matters, the court is satisfied that there was nothing in them which would justify the court interfering with the conviction, and the only question which falls for decision is that for which the certificate was granted.

[His Lordship stated the facts substantially as set out above and continued:] The question as to how far evidence may be called by the prosecution after the case has been closed has been discussed in many cases, but in only one in such circumstances as these. It is quite clear that a judge may in his discretion allow evidence to be called in rebuttal of some case set up for the first time by the defence. The case usually cited as authority on this point is *Reg.* v. *Frost*,[13] where Tindal C.J. said[14]: "There can be no doubt about the general rule, that where the "Crown begins a case, (as it is with an ordinary plaintiff), they "bring forward their evidence, and cannot afterwards support "their case by calling fresh witnesses, because there may be "evidence in the defence to contradict it. But if any matter "arises ex improviso, which the Crown could not foresee,

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[12] 29 Cr.App.Rep. 106.

[13] 9 C. & P. 129; 4 St.Tr.N.S. 86.

[14] 9 C. & P. 129, 159.

"supposing it to be entirely new matter, which they may be "able to answer only by contradictory evidence, they may give "evidence in reply." This, it will be observed, is referring only to the right of the Crown to call evidence in rebuttal and is not concerned with the question whether evidence can be given after the summing-up. We may observe that the rule laid down by Tindal C.J. is probably in wider language than would be applied at the present day. Indeed, in *Rex* v. *Crippen* [15] the court said in terms that they did not propose to adopt the language of that judge and that they considered that the rule laid down in those terms might in some cases place an unfair burden on counsel for the prosecution and that it was a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in-chief, ought to be given as rebutting evidence. In *Rex* v. *Dora Harris* [16] the court seems to have reconsidered with approval the words we have just cited from *Reg.* v. *Frost*,[17] but this was a case in which the recorder himself called a witness towards the end of the case and examined him himself. In *Rex* v. *Sullivan* [18] rebutting evidence was called before the summing-up and after the speech of counsel for the defence, apparently to rebut a suggestion in his speech that a particular person had committed the offence with which the prisoner was charged, and it was held that the judge had a discretionary power to act as he did and that this court would not interfere unless they were of opinion that an injustice had been caused, whereas in *Rex* v. *Liddle* [19] the deputy chairman of sessions adjourned a case for three days to enable evidence to be called to rebut the defence of an alibi, and it was held that the conviction must be quashed as this was an irregularity, the court considering that the nature of the defence was one of so common a kind that it must always be anticipated and that it was not proper to take the course there adopted merely for the purpose of rebutting the defence of an alibi.

None of these cases—and there are more to the like effect—are really in point in determining the question which falls for decision in this case, and the only case of which we are aware in which the point has actually arisen is that of *Rex* v. *Browne*.[20] There, after the summing-up and the enclosure of the jury, the latter asked the chairman to allow some evidence to be given with regard to the prisoner's state of mind and, after some pressure, the chairman allowed the prison doctor to be called, who gave evidence on this matter. It is true that in that case there were other grounds for quashing the conviction, but the court, consisting of Lord Caldecote C.J., Asquith and Cassels JJ., were of opinion that this was an irregularity and was a reason for quashing. In the judgment of the court it is stated [21]: "A jury "is sworn to give a verdict according to the evidence. It is not "sworn to give a verdict according to any suggestions or pro-"positions which may have been followed up in the course of the "trial."

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[15] [1911] 1 K.B. 149, 157.

[16] [1927] 2 K.B. 587.

[17] 9 C. & P. 129, 159; 4 St.Tr.N.S. 86, 386.

[18] [1923] 1 K.B. 47.

[19] (1928) 21 Cr.App.Rep. 3.

[20] 29 Cr.App.Rep. 106.

Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed, where it becomes necessary to rebut matters which have been raised for the first time by the defence. It is much more likely that this may be necessary nowadays since prisoners are entitled to give evidence on their own behalf whereas in the days of Tindal C.J. such evidence could not be given, and, as we have already pointed out, this court in *Rex* v. *Crippen* [22] declined to adopt the rule that he laid down in all its strictness. It must be a matter for the discretion of the judge, which should be applied with caution, but it appears to us that it is quite another thing to say that after the whole case is concluded, and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury. In fact, the evidence which was admitted was not evidence by way of rebuttal of any matter set up by the prisoner. If it contradicted any evidence it was that of the police inspector, who was a witness for the prosecution.

It is by no means uncommon for a jury to put a question to the presiding judge after he has concluded his summing-up and whether before or after they have retired, and the usual practice is for the judge to tell the jury, if it is the fact, that no evidence on the point has been given and they must take it, therefore, that there is no evidence upon it, though, of course, if they ask a question upon which evidence has been given it is quite right for the judge to remind the jury of the evidence. We think this is the only safe practice, and it ought to be followed. The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that whether it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex* v. *Browne*,[23] the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put upon it. A witness might be called who would then be open to cross-examination and the defence might then apply to call further evidence in answer. In this case it is true that the question asked by the jury was most pertinent, and it is not an unfair assumption to make that their verdict depended on the answer which the doctor gave. If he had said other people were likely to be at the clinic at the time it is a reasonable assumption that the jury would have said not guilty. As his evidence was that there were no people about at the time, it is quite easy to see that the jury thought this was a vital point, and almost immediately after the evidence had been given they returned a verdict of guilty. We think they ought to have been told that the prosecution had laid before them such evidence as they had thought fit and the evidence could not now be reopened. It is only fair to the judge to say that he himself felt considerable doubt whether it was right to recall the witness. He, of course, did not have the advantage on circuit of seeing the Criminal Appeal Reports and, had he been able to refer to *Rex* v. *Browne*,[24] he probably would not have admitted the evidence. In any case, we think it right to lay down that once the summing-up is concluded, no further evidence ought to be given. The jury can be instructed in reply to any question they may put on any matter on which evidence has been given, but no further evidence should be allowed.

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[21] 29 Cr.App.Rep. 106, 112.

[22] [1911] 1 K.B. 149.

There were, in the indictment, counts relating to similar offences upon two other girls. Application was made to the judge to direct separate trials, to which he did not at first assent, but in the course of the case he thought in fairness to the prisoner it would be desirable that the cases should be dealt with separately. He accordingly stopped evidence with regard to counts 7 and 8 and directed the jury to confine themselves only to the charges in respect of one of the girls, and it was in respect of the counts relating to that girl that the verdict was returned. The other counts remain on the file. In all the circumstances the court directs that they should be proceeded with at the next

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[23] 29 Cr.App.Rep. 106.

[24] 29 Cr.App.Rep. 106.

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assizes for Merioneth, where the offences were alleged to have been committed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Hatchett Jones & Co., for Edward Jones & Son, Blaenau-Festiniog.*

J. F. L.

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May 1, 15.

Somervell, Jenkins and Morris L.JJ.

REGINA *v.* ST. HELENS AND AREA RENT TRIBUNAL. *Ex parte* PICKAVANCE.

Landlord and Tenant—Rent tribunal—Security of tenure—Notice to quit given by landlord more than three months after decision of tribunal—Jurisdiction of tribunal to grant or extend security of tenure—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5*—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 11 (1).

A rent tribunal has power by section 5 of the Furnished Houses (Rent Control) Act, 1946, to grant a period of security of tenure only where the tenant, after referring a furnished tenancy to the tribunal, receives notice to quit either before the tribunal makes a decision or within three months thereafter; and the power given by section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949 (which by subsection (5) of section 11 must be construed as one with the Act of 1946) to grant extensions of the security of tenure can be exercised only where the conditions as to the notice to quit in section 5 of the Act of 1946 are satisfied.

Where, therefore, a tenant referred his contract to a tribunal (which approved the rent and made no order for security of tenure) and the landlord served a notice to quit more than three months after the decision of the tribunal had been given:—

Held (*per* Somervell and Morris L.JJ., Jenkins L.J. dissenting) that the tribunal had exceeded its jurisdiction in granting extensions of security of tenure under section 11 of the Act of 1949.

Decision of Divisional Court [1952] W.N. 98 affirmed.

APPEAL from Divisional Court.[1]

On August 1, 1948, Mrs. Ethel Pickavance, the owner of a furnished house, 15 Rodney Street, St. Helens, Lancashire, let it to the tenant, William J. Leyland, at a weekly rent of £1. On August 1, 1950, the tenant applied to the St. Helens and Area Rent Tribunal to reduce the rent under the Furnished

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[1] [1952] W.N. 98.

Houses (Rent Control) Act, 1946.[2] On September 8, 1950, the tribunal gave its decision, making no change in the rent and no order as to security of tenure. On December 9, 1950, one day beyond three months from the date of the tribunal's decision, the landlord served a notice to quit on the tenant to take effect on December 18. On December 9 the tenant applied to the tribunal for security of tenure under section 11 (1) of the Act of 1949,[2] which was granted. Three further applications were made by the tenant and he was granted further extensions on April 18, September 7 and October 16, 1951. The landlord then applied to the Divisional Court for an order of certiorari to bring up and quash the latest of the tribunal's directions, that of October 16, 1951.

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[2] Furnished Houses (Rent Control) Act, 1946, s. 5: "If, after a "contract to which this Act applies "has been referred to a tribunal by "the lessee or by the local authority "(either originally or for reconsideration), a notice to quit the premises "to which the contract relates is "served by the lessor on the lessee at "any time before the decision of the "tribunal is given or within three "months thereafter, the notice shall "not take effect before the expiration "of the said three months: Provided "that (*a*) the tribunal may, if they "think fit, direct that a shorter "period shall be substituted for the "said three months in the application "of this section to the contract that "is the subject of the reference; and "(*b*) if the reference is withdrawn, "the period during which the notice "is not to take effect shall end on "the expiration of seven days from "the withdrawal of the reference."

Landlord and Tenant (Rent Control) Act, 1949, s. 11 (1): "Where "a contract to which the Act of "1946 applies has been referred to "a tribunal under that Act, and "the reference has not been withdrawn, the lessee may, at any time "when a notice to quit has been "served and the period at the end "of which the notice takes effect "(whether by virtue of the contract, "of the Act of 1946 or of this section) has not expired, apply to the "tribunal for the extension of that "period: Provided that an application shall not be made under this "section where the tribunal have "directed, under paragraph (*a*) of "the proviso to section five of the Act "of 1946, that a shorter period shall "be substituted for the period of "three months specified in that section as the period before the end of "which a notice to quit shall not "have effect.

"(2) On an application being made "under this section—(*a*) the notice "to quit to which the application "relates shall not, unless the application is withdrawn, have effect "before the determination of the "application; (*b*) the tribunal, after "making such inquiry as they think "fit, and giving to each party an "opportunity of being heard . . . "may direct that the notice to quit "shall not have effect until the end "of such period, not exceeding three "months from the date at which the "notice to quit would have effect "apart from the direction, as may "be specified in the direction; (*c*) if "the tribunal refuse a direction "under this section, the notice to "quit shall not have effect before the "expiration of seven days from the "determination of the application.

"(5) This section shall be construed as one with the Act of 1946, "and references in this section to "that Act shall be construed as references to that Act as extended by "section seven of this Act."

On February 12 the Divisional Court held that the tribunal had exceeded its jurisdiction in granting extensions of security of tenure under section 11 of the Act of 1949, and therefore that an order of certiorari should go and the direction of the tribunal be quashed.

The tribunal appealed.

Sir Lionel Heald A.-G. and *J. P. Ashworth* for the Rent Tribunal. The question is whether the Divisional Court has misconstrued section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. If it has not, then, having regard to the importance of the problem of housing accommodation an amendment of the law may be thought to be desirable. The application to the tribunal for a reduction of rent was admittedly within the Act of 1946. No order was made, and no notice to quit had been served, and therefore no question arose as to shortening the term of the notice to quit. No power is given under the Act of 1946 to lengthen the term. Quite clearly the notice to quit served three months and one day after the decision of the tribunal given in the present case is not touched by section 5 of the Act of 1946, and that this was a defect was recognized by the court in *R.* v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey.*[3] It is generally agreed that the Act of 1949 to some extent increases the protection given to the tenant. By subsection (5) of section 11, "This section shall be construed as one with the Act of "1946," and therefore section 5 of the Act of 1946 and section 11 of the Act of 1949 have to be read together. The Divisional Court has held, in effect, that section 11 is only an extension of the power given by section 5 and that the Act of 1949 affords no more protection to the tenant than the Act of 1946. It is submitted that the Divisional Court erred in its approach to the question at issue. Under section 11 the conditions precedent to the granting of an extension are (1) a reference to a tribunal; (2) the reference must not have been withdrawn; and (3) the application must be made "at any time" when a notice to quit has been served and the period of the notice has not expired. The conditions precedent under section 5 are not the same. The Divisional Court held that to the words "at any time" in section 11 must be added "within three months of the decision of the "tribunal." It is submitted that those two terms must be given their own separate construction. There was here a reference, it was not withdrawn, notice to quit was given and "at any time" the lessee may apply to the tribunal for an extension of the period of security. If the object of the Act of 1946 was to protect the tenant against retaliation, then the Act of 1949 affords him some further protection. It must be presumed that Parliament was aware of the limitations of the Act of 1946 and the court should give to section 11 of the Act of 1949 its natural meaning.

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[3] [1952] 1 K.B. 54.

Fox-Andrews Q.C. and *John Harington* for the landlord. The effect of subsection (5) of section 11 of the Act of 1949 is that section 11 must be construed in the light of section 5 of the Act of 1946, and there must be given to it the sort of meaning which a person after reading section 5 would attach to it. The decision of the Divisional Court was right for the reasons given by Lord Goddard C.J. and Parker J. The latter correctly said: "The "question therefore comes to a very short point—namely, "whether the words 'when a notice to quit has been served' are "perfectly general, referring to any point of time in the future, "or whether they refer to a notice to quit served within the limits "of time specified in section 5 of the Act of 1946." It is submitted that the effect of the two sections read together is that where a contract has been referred to a tribunal and a notice to quit has been served within three months of the date of the tribunal's decision, the lessee may at any time, not later than the expiration of such three months' period, or within the currency of the notice to quit, apply for an extension of the time during which the notice shall not take effect. But the tribunal has no jurisdiction to entertain an application for an extension unless the notice to quit has been served after the reference and within three months of the tribunal's decision. Nothing is to be found in the relevant sections of the two Acts which points to an intention by Parliament to provide necessarily for the protection of a tenant virtually in perpetuity.

[*Aristoc Ld.* v. *Rysta Ld.*[4]; *River Wear Commissioners* v. *Adamson*[5]; and *Union of South Africa (Minister of Railways and Harbours)* v. *Simmer and Jack Proprietary Mines*[6] referred to.]

Cur. adv. vult.

May 15. The following judgments were read:—

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[4] [1945] A.C. 68.

[5] (1877) 2 App.Cas. 743, 763.

[6] [1918] A.C. 591, 596.

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SOMERVELL L.J. This is an appeal from an order of the Divisional Court that certain directions given by a rent tribunal be quashed on an application for an order of certiorari. It turns on the construction of section 11 of the Landlord and Tenant (Rent Control) Act, 1949. One has first to refer to the Furnished Houses (Rent Control) Act, 1946, with which that section has to be read and construed.

That Act provides under section 1 for the setting up of tribunals in areas to be specified by the Minister of Health. Section 2 provides that where there is a contract for the letting of furnished premises either the lessor, the lessee or the local authority may refer the contract to the tribunal. The tribunal are given power (1) to approve the rent; (2) to reduce the rent; (3) to dismiss the application. If the rent is approved or reduced it is entered in a register. It is not so entered if the application is dismissed. In relation to a rent so entered in the register either lessor, lessee or local authority may refer the matter to the tribunal for reconsideration of the rent on the ground of change of circumstances. On such a reference the tribunal have power to increase as well as approve or reduce the rent. The result of their decision will be entered in the register. The section with which we are in the main concerned is section 5.

[His Lordship read the section and continued:] The main scheme of this is clear. Unless the proviso is applicable the lessee is protected for a period starting with the reference and ending three months after the decision. But for some such provision in the case of a tenancy with a short period of notice the lessee could be dispossessed before the reference was considered. This might well have defeated quoad such tenancies the purpose of the Act. It would not have been worth applying. Similarly, immediately the decision was given the lessor could give under his contract say a week's notice. This also might have been a powerful factor in dissuading lessees from operating the Act.

[His Lordship then stated the facts and, having read section 11 of the Act of 1949, continued:] The Attorney-General, who argued the case for the rent tribunal, submitted that all the conditions of section 11 had been fulfilled. The contract had been referred to the tribunal; the reference had not been withdrawn; a notice to quit had been served and the period at the end of which it took effect had not expired; the tribunal had not shortened the three months' period. It was submitted by Mr. Fox-Andrews, on behalf of the applicant lessor, that section 11, read with section 5, should be construed as operating only on notices to quit served within the limits of time specified in and covered by section 5 of the Act of 1946.

In the Divisional Court the Lord Chief Justice put it in this way: "The other point we decided in the case"—that is a reference to an earlier case—"was that section 11 does not give "a new power to the tribunal; it only extends the power that "was given by section 5. Section 5, like section 11—or section "11, like section 5; it does not matter which way you put it— "only appears to me to apply where a notice to quit has been "served after a reference and before a decision, or within three "months thereafter; otherwise section 5 has no application and "does not give the tenant a right to apply for an extension of the "tenancy. Therefore before section 11 can take effect it seems "to me that exactly the same things have to be shown as are "shown under section 5, because the two things have to be read "together. The words, as has been pointed out in the course of "the argument by my brother Parker, were not intended, or at "any rate are not apt, to give a tenant of a furnished house the "same protection that is given by the Rent Restriction Acts to a "tenant of an unfurnished house; they only give him this limited "protection in certain circumstances, circumstances which seem "to us to be dominated by the fact that they are designed to "prevent the retaliation by a landlord of serving a notice to quit "in consequence of the tenant having referred the matter to the "tribunal."

On the construction submitted by the Attorney-General the results are extensive and illogical. On his construction it does not matter at what distance of time the reference was made or what was its result, unless it was withdrawn or the tribunal shortened the period. Assume a reference which is dismissed either for want of prosecution or because it is regarded as unjustified. The lessor may be perfectly content with the lessee so long as the rent is paid and does not ask for a shortening of the period, as he has no immediate intention of serving a notice. Five years later he serves a notice and finds that the lessee is protected by section 11. One asks oneself on what principle Parliament could have intended to protect lessees whose applications are dismissed, or lessees who applied unnecessarily, because the rent is approved, but withhold the same protection from tenants who were sensible enough not to put themselves and their lessors to trouble and expense from which they derived no advantage. I would also find it difficult to understand why a lessee who fails when a reference is pressed to a decision, is put, if there is no shortening, in a better position than a lessee upon whom wisdom descends before the hearing and who decides to withdraw the reference.

On the other hand these are all conditions which one would expect to find if the section is operating, as the Divisional Court held, on notices to quit given within the period specified in section 5. The words in brackets are all required on this more limited construction. The words " by virtue of the contract " are necessary because a notice to quit might be served say within the three months which expired after the three months. That is, a notice served within the limits of time covered by section 5.

The Attorney-General submitted, I think with force, that on the Divisional Court's construction section 11 is likely to be of very little assistance. Lessors will now not serve notices to quit within the period specified. On the view that Parliament intended to give some power to extend the period of three months from a decision, they do not seem to have effectively achieved that purpose.

I will turn to the words used. The opening words of section 11 (1) themselves indicate to me that the section will be dealing with what has happened in the course of a reference. Section 5 extends that " course " by the period of three months after the decision. If it had been intended to make the section operate if there had been a reference at any time one would, I think, have found this made clear by the words " at any time " being inserted before the word " referred ". The extravagant illogicalities which I have stated, I think, emphasize the need for these words. Sometimes, of course, the words " at any time " are unnecessary. The context implies them. I agree with Parker J. that the words " at any time " where they occur in section 11 do not assist the Attorney-General's argument. The fact that they are where they are, and not where they would be if his argument is right, is, if anything, against it. They are related to the lessee's application to the tribunal. When a notice to quit has been served and not expired he may " at any time " apply to the tribunal. That is how I read them and I do not think they assist in deciding whether the section is dealing with what I will call section 5 notices or all notices in future after there has been a reference.

The distinction which the section draws between cases where the reference has been withdrawn and other cases also, I think, supports the Divisional Court's decision. The period of protection in the former case was fixed by section 5 and it was not desired to interfere with it. But, as I have indicated, if the section was dealing with all notices in futuro, it would be illogical not to put in the same category references which were dismissed but where, possibly per incuriam, the tribunal had not shortened the period.

It was pointed out that if a notice had been served within the section 5 period the tribunal has power to extend indefinitely, if successive applications are made. This is true, but their approach to the problem would or should be that they were being asked to extend a protection which Parliament had prima facie thought should end after three months. On the Attorney-General's argument they are given no guidance of any kind as to how they are to approach or deal with applications in respect of notices when the section 5 period has elapsed. It gives a discretionary protection, analogous to that given by the Rent Acts, without any conditions, or limitations or guidance.

For these reasons I think the decision of the Divisional Court was right. I should perhaps add that the Attorney-General stated that the Crown had, of course, no interest as between lessor and lessee, but desired a decision of this court on the construction of the section. Appearing for the rent tribunal he put, if I may say so, every argument for the view which they had taken of their powers very cogently before us. I would dismiss the appeal.

JENKINS L.J. This is an appeal by the St. Helens and Area Rent Tribunal, constituted under the Furnished Houses (Rent Control) Act, 1946, from an order of certiorari made by the Queen's Bench Division on February 12, 1952, to bring up and quash certain directions given by the tribunal as being directions which they had no jurisdiction to give.

[The learned Lord Justice stated the facts and continued:] The contention which prevailed before the Divisional Court was to the effect that upon the true construction of section 11 of the Act of 1949, read in conjunction with section 5 of the Act of 1946, the jurisdiction of the tribunal to extend the period of a notice to quit under section 11 only arises where a notice to quit has been served between the date of the reference and the expiration of a period of three months from the date of the tribunal's decision. If this contention is well-founded, then of course it follows that the directions here called in question were made without jurisdiction, inasmuch as the notice to quit was not served until after (albeit only one day after) the expiration of the aforesaid period of three months. On the other hand, if on its true construction section 11 enables the tribunal to direct the extension of the period of a notice to quit given " at any time " after the reference to the tribunal, provided only that the application for extension is made before the expiration of the period at the end of which the notice to quit would otherwise take effect, then it was within the jurisdiction of the tribunal to give the two directions with which the present appeal is concerned, and the order of the Divisional Court cannot stand.

In order to appreciate the effect of section 5 of the Act of 1946 and section 11 of the Act of 1949 (on the construction of which two sections and primarily of the latter the case ultimately depends) it is necessary to refer briefly to some of the other provisions of the earlier enactment. Section 1 of the Act of 1946 provides for the application of the Act by order of the Minister of Health to districts consisting of the whole or parts of the respective areas of local authorities and the constitution of a tribunal for each district in which the Act is in force. Section 2, by subsection (1), enables " contracts to which this Act applies," which may be compendiously described as " contracts for furnished " letting," to be referred by the lessor or the lessee or the local authority to the tribunal for the relevant district.

Subsections (2) and (3) of section 2 are in these terms: " Where any contract to which this Act applies is referred to a " tribunal, then, unless at any time before the tribunal have " entered upon consideration of the reference it is withdrawn by " the person or authority by whom it was made, the tribunal shall " consider it and, after making such inquiry as they think fit, and " giving to each party (and, if the house is one the general " management whereof is vested in and exercisable by a housing " authority, to that authority) an opportunity of being heard, or, " in his option, of submitting representations in writing, shall " approve the rent payable under the contract or reduce it to such " sum as they may, in all the circumstances, think reasonable, " or may, if they think fit in all the circumstances, dismiss the " reference, and shall notify the parties and the local authority " of their decision in each case. (3) Where the rent payable for " any premises has been entered in the register in accordance " with the provisions hereinafter contained, it shall be lawful for " the lessor or the lessee or the local authority to refer the case " to the tribunal for reconsideration of the rent so entered on the " ground of change of circumstances, and the provisions of sub- " section (2) of this section shall apply on any such reference in " like manner as they apply on a reference under subsection (1) "of this section subject to the modification that the tribunal "shall have power to increase the rent payable."

Section 3 provides for the keeping by the local authority of a register which is to contain prescribed particulars of any contract under which a rent is payable which has been approved, reduced or increased under section 2, and section 4 makes it unlawful to require or receive rent in excess of the registered rent in respect of any premises.

Then comes section 5 itself. [His Lordship read the section.]

Pausing there, I would observe that in the present case, by virtue of section 5, and in view of the absence of any direction by the tribunal to the contrary, the lessee, having referred the contract to the tribunal and having maintained the reference to a decision as distinct from withdrawing it before the tribunal had entered upon its consideration, became entitled to remain in undisturbed possession of the premises for a minimum period of three months from the date of the decision, notwithstanding any notice to quit given in conformity with the terms of the contract and purporting to take effect before the expiration of that period. Any notice to quit so given and purporting to take effect before such expiration would operate as a notice to quit taking effect on such expiration, while any notice to quit given in accordance with the terms of the contract, so as to take effect on or after the expiration of the aforesaid period of three months, would (so far as section 5 was concerned) take effect according to its terms, even though given (as a notice to take effect on such expiration would obviously have to be given) during such period of three months.

Finally, there is section 11 of the 1949 Act. This section seems to me to provide in reasonably clear terms (by subsection (1)) that where the following three conditions are satisfied, that is to say, where (a) a contract to which the Act of 1946 applies has been referred to a tribunal, and (b) the reference has not been withdrawn, and (c) the tribunal has not directed under section 5 of the Act of 1946 that a shorter period shall be substituted for the period of three months therein specified as the period before the end of which a notice to quit shall not have effect, then at any time when a notice to quit has been served, but the period at the end of which the notice is to take effect has not expired either (i) "by virtue of the contract" (that is because although the period of three months mentioned in section 5 of the Act of 1946 has expired the period of notice appropriate to the particular contract has not); or (ii) "by virtue of the Act of 1946" (that is because the period of three months mentioned in section 5 of that Act has not expired and the notice, though purporting, in accordance with the terms of the contract, to take effect before the end of that period, is prevented from taking effect until the end of that period by the provisions of section 5); or (iii) by virtue of section 11 itself (that is because in a case falling within (i) or (ii) above, the period at the end of which the notice would otherwise have taken effect has already been extended by the tribunal under the provisions of section 11, pursuant to some previous application or applications under that section, and such extended period has not yet expired)—the lessee may apply to the tribunal for an extension of the period at the end of which the notice would otherwise take effect; and (by subsection (2) (*b*)) that on such an application being made the tribunal may extend the period at the end of which the notice to quit would otherwise take effect by such period, not exceeding three months, as may be specified.

The periods which the tribunal is empowered to extend are thus in case (i) above, the contractual period of notice; in case (ii) above, the statutory period of notice imposed by section 5 of the Act of 1946; and in case (iii) above, the statutory period of notice superadded by the previous operation of section 11 either to the contractual period of notice or to the statutory period of notice imposed by section 5.

The lessee is in terms empowered to make his application at any time after a notice to quit has been served and before the period at the end of which it would otherwise take effect has expired, whether that period is simply the contractual period, unaffected by section 5, or the statutory period imposed by section 5, or the statutory period superadded under section 11 either to the contractual period or to the section 5 period.

I appreciate that where the relief sought by an application under section 11 is an extension of the statutory period of notice imposed by section 5, then, ex hypothesi, the notice to quit must have been served (and must according to the terms of the contract have purported to expire) and the application for such extension (or the first of such applications if more than one) must have been made within the period of three months mentioned in section 5.

But I see no warrant in section 11, or in section 11 read in conjunction with section 5, either as a matter of express provision or as a matter of necessary implication, for holding that where the period sought to be extended is simply the contractual period of notice unaffected by section 5, the tribunal only has power to direct an extension if the notice to quit was served before the expiration of the period of three months mentioned in section 5. That section, as pointed out above, has nothing to say to a notice to quit expiring, according to the terms of the contract, with or after the expiration of the three months' period, whether such notice is served before or after the expiration of that period. What is material for the purpose of bringing into operation in any particular case the statutory period of protection afforded by section 5 is not the date at which the notice to quit is served (provided, of course, it is served after the contract has been referred), but the date at which it would according to the terms of the contract, and apart from the provisions of the section, take effect. If the latter date is before the end of the three months' period then section 5 gives security of tenure until the end of the three months; if it is after the end of the three months' period then section 5 does not operate, and, so far as the provisions of that section are concerned, the notice simply takes effect in accordance with the contract.

Accordingly I find it impossible to escape the conclusion that, where the extension of a purely contractual period of notice is in question, the jurisdiction of the tribunal is not limited to cases in which the notice to quit has been served before the expiration of the period of three months mentioned in section 5, but extends to all cases in which according to the terms of the contract the notice to quit would take effect at or after the end of that period, whether the notice was served before or after that date. There is, so far as I can see, nothing whatever in the language of section 11 to impose any such limitation, and nothing in the provisions of section 5, read in conjunction with section 11, to require or justify the implication of any such limitation on what appear to me to be the plain terms of section 11.

Moreover a limitation of this character on the jurisdiction of the tribunal would produce strange anomalies. For instance, if the lessor under a furnished weekly letting gave one week's notice to quit by notice served the day before the expiration of the three months' period mentioned in section 5, the tribunal would have jurisdiction, on the application of the lessee at any time before the expiration of the contractual period of one week from the service of the notice, to grant up to three months' extension of the contractual period, and moreover to grant, on the application of the lessee before the expiration of that extension, yet another extension of the period at the end of which the notice would otherwise take effect, and so on ad infinitum. If, on the other hand, the lessor under a like letting gave one week's notice to quit by notice served the day after the expiration of the three months' period mentioned in section 5, the tribunal would have no jurisdiction to grant any extension of the contractual period of notice and at the end of it the lessee would have to go. I I cannot attribute to the legislature an intention to produce a result so capricious, and in the absence of clear words constraining me to do so I decline to construe section 11 as producing it.

Furthermore, section 11 is clearly designed to give some additional protection to lessees, but if the jurisdiction of the tribunal under it were limited in the way above mentioned the additional protection which it purports to afford would for all practical purposes be illusory; for a lessor could always evade its provisions by the simple expedient of refraining from serving notice to quit until after the expiration of the three months' period mentioned in section 5.

The Divisional Court, which took a different view, appears to have based its decision on two grounds, the first being that section 5 was designed to prevent retaliation by lessors against lessees who referred their contracts to a tribunal by ejecting such lessees within a short time of the tribunal's decision; and the second being that section 11 of the Act of 1949, which section has to be construed as one with the Act of 1946 (see subsection (5)), did not confer a new security of tenure, but merely extended the security of tenure afforded by section 5 of the Act of 1946.

As to the first ground, I do not think that the imputation to section 5 of the object of preventing retaliation by lessors, which is merely a picturesque way of saying that its object is to prevent lessors from deterring applications to the tribunal by their lessees, and defeating the tribunal's decisions upon such applications when made, by ejecting their lessees before the expiration of three months from the dates of such decisions, materially advances solution of the question of construction arising on section 11. The object of section 5 surely was not to punish lessors, but to give some measure of protection, in point of security of tenure, to lessees whose contracts of tenancy have been referred to a tribunal. The object of section 11, palpably, was to give such lessees some additional security of tenure over and above what they had under section 5, and the question is what on the true construction of section 11 that additional protection amounts to.

As to the second ground, I confess I find myself unable to follow it. Section 11, as I have said, purports to give lessees some additional protection in the way of security of tenure over and above what is given them by section 5. The nature and extent of the additional protection so given must depend on the true construction of section 11 read, no doubt, in conjunction with section 5. If on the true construction of section 11, so read, the effect of section 11 is merely to extend the security of tenure afforded by section 5 in cases in which that security of tenure has in fact become operative, then section 11 must be accorded that limited effect; but there can be no warrant for thus limiting its construction by reference to a preconceived idea that it should be so limited. As pointed out above, the only case in which the statutory security of tenure afforded by section 5 in fact becomes operative is the case in which notice to quit is served, and according to the terms of the contract would take effect, before the expiration of the period of three months mentioned in section 5. Clearly the jurisdiction of the tribunal under section 11 cannot, as a matter of construction, be limited to that case, for then the words "by virtue of the contract" in section 11 (1) would be wholly inappropriate, in as much as the only periods to which it had reference would be periods at the end of which notices to quit took effect by virtue of section 5 of the Act of 1946 or of section 11 itself. The jurisdiction under section 11 being in terms applicable to periods at the end of which notices to quit take effect "by virtue of the contract," it seems to me that the theory that such jurisdiction is limited to extending the statutory security of tenure afforded by section 5 in cases in which such security of tenure has in fact become operative falls to the ground; and I can see no justification, whether by reference to that theory or otherwise, for holding that section 11 gives jurisdiction to extend a purely contractual period of notice if the notice to quit is served before the expiration of the period of three months mentioned in section 5, but not if the notice to quit is served after such expiration. This seems to me a purely arbitrary distinction unsupported by anything in the terms of section 11.

A point was sought to be made for the lessor of the alleged unreasonableness of giving the lessee something in the nature of a perpetual right of renewal merely because his contract had been referred to the tribunal and the reference had not been withdrawn. But this unreasonableness, if such it be, would not be mended by according the right to some lessees and not to others on the arbitrary and anomalous basis to which I have already referred.

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Moreover, it must be remembered that in wholly unmeritorious cases a safeguard is provided in the shape of the tribunal's power under section 5 to abridge the three months' period and thus exclude the application of section 11 by virtue of the proviso to subsection (1) of that section; and further that each application for an extension under section 11 has to be adjudicated upon by the tribunal, who, it must be assumed, will grant or refuse each application upon its merits in a reasonable and proper exercise of their discretion.

It was also argued that section 11, if construed so as to give the tribunal jurisdiction in such a case as the present, would involve the introduction, by what purports to be merely an amending section, of a radical alteration in the scope and purpose of the Act of 1946 as originally enacted. That Act, it is said, was concerned with security of tenure simply as an aid to the effective operation of the control by the statutory tribunals of the rents of furnished dwellings; whereas section 11 of the Act of 1949, if given the construction contended for on the part of the tribunal in the present case, would make security of tenure per se a substantive and independent object of the legislation. This revolutionary result, it is claimed, should only be accorded to section 11 if its language clearly and necessarily demands that conclusion.

I would answer this argument by saying first that in my view the language of section 11 does on examination clearly and necessarily demand the construction contended for on the part of the tribunal; and, secondly, that on either construction the allegedly revolutionary result is produced, the only difference being that its operation is on the one view uniform and on the other view capricious. I would add that legislation for the control of rents is notoriously ineffective in the absence of some degree of security of tenure, and that the degree of security of tenure which it is necessary or desirable to provide in such legislation is essentially a matter for Parliament. I see nothing in section 11, when construed in the way contended for on the part of the tribunal, which can be properly described as alien to or inconsistent with the general scope and purpose of the Act of 1946.

I recognize that the words "Where a contract . . . has been "referred . . . and the reference has not been withdrawn" at the beginning of section 11 (1) do at first sight suggest a limitation of the application of section 11 to cases in which the reference can be said to be in some sense pending. But reference to the opening words of section 5: "If, after a contract . . . has been referred . . ." and the special provision made for the case of a withdrawn reference in proviso (*b*) to the same section, makes it, I think, reasonably plain that the opening words of section 11 do include every case in which a contract has at any time been referred to the tribunal and such reference is either pending or has been dealt with in any manner by the tribunal, provided only that it has not been withdrawn and thus removed from the tribunal's consideration. I appreciate that this produces a somewhat curious result in that it apparently would enable a lessee to claim the benefit of section 11 even where his application has been dismissed by the tribunal. But section 5 itself would seem to be open to a similar criticism, and perhaps (as suggested above in reference to the general argument of unreasonableness) the answer to it is that if an application were dismissed as being wholly unmeritorious the tribunal would be likely to give a direction under proviso (*a*) to section 5 substituting a shorter, and it may be merely nominal, period for the period of three months mentioned in that section, thus depriving the lessee pro tanto of the protection of section 5 and excluding him altogether from the benefit of section 11. In any case I cannot regard this point as justifying the departure from the express terms of section 11, in my view involved in the construction placed upon it by the Divisional Court, which construction moreover does not, any more than the construction contended for on the part of the tribunal, disqualify a lessee's application on the ground that his reference has been dismissed.

Another curious feature of section 11 is that it is not in terms confined, as section 5 is confined, to notices to quit served by the lessor on the lessee. It may well be that it should by implication be so confined, particularly as the two sections are to be read together. But whether this is so or not I cannot regard the omission from section 11 of words expressly limiting it to lessors' notices to quit as affording any support to the construction placed on section 11 by the Divisional Court. Nor do I think the circumstance (adverted to by the Lord Chief Justice in the course of his judgment) that the legislation does not extend to lettings for a fixed term as opposed to "periodic" lettings, has any bearing on the question raised in this case. The legislature may well have considered that the great majority of cases calling for protection arose under lettings of the "periodic" type, and that the additional complication and difficulty of bringing in fixed-term lettings (which would obviously have called for a quite different

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method of treatment) would be out of proportion to the practical utility of doing so.

The decision of the Divisional Court in the present case was to some extent founded on the judgments of the Divisional Court in the case of *R.* v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey.*[7] The question in that case was whether section 11 applied to a notice to quit which had been served by a lessor on a lessee before the contract had been referred to the Tribunal, and the Divisional Court held that it did not. I think the actual decision was clearly right, as the language of section 11 seems plainly to require that the contract should have been referred before service of the notice to quit with respect to which an extension is sought by the lessee. But in so far as the reasoning on which the decision was based turned on construing section 11 in the sense in which that section has now been construed by the Divisional Court in the present case (which was as it seems to me unnecessary for the purpose of the decision) I find myself unable to agree with it. For these reasons, I would allow this appeal.

Morris L.J. Among the diverse purposes of the Landlord and Tenant (Rent Control) Act, 1949, as recorded in its heading was that of amending the Furnished Houses (Rent Control) Act, 1946, as respects security of tenure. The Act of 1946 does not employ the phrase "security of tenure" but it is clear that a reference to the provisions of section 5 of that Act is denoted. It seems further to be clear that it is by the provisions of section 11 of the Act of 1949 that the amendment is achieved. The heading of the Act of 1949 does not delimit or define the extent of amendment that is to be enacted. It does not therefore provide any pointer which can give guidance in the solution of the problems of construction raised in this appeal. It is to the words and provisions of section 11 of the Act of 1949 that attention must be directed in order to decide what amendment has been made as respects security of tenure. The inquiry becomes one as to the extent to which there has been modification of the security of tenure given to a lessee by section 5 of the Act of 1946. In the case of a contract to which the Act of 1946 applied a lessee only had the measure of security given by section 5 if (*a*) the contract had been referred to a tribunal by the lessee or by the local authority, and (*b*) after such a reference the lessor served a notice to quit on the lessee either before the decision of the tribunal was given or within three months thereafter. The Act of 1949 might amend the provisions of section 5 fundamentally by enacting that in quite different situations than those covered by (*a*) and (*b*) above a measure of security should be given or there might be amendment of the measure of security given or there might be a combination of these. The contents of section 11 of the Act of 1949 must furnish the answer to the inquiry raised.

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[7] [1952] 1 K.B. 54.

It is enacted that section 11 is to be construed as one with the Act of 1946. In *Canada Southern Ry.* v. *International Bridge Co.*,[8] Lord Selborne L.C. said: "It is to be observed that those "two [Canadian Legislature] Acts are to be read together by "the express provision of the seventh and concluding section of "the amending Act; and therefore we must construe every part "of each of them as if it had been contained in one Act, unless "there is some manifest discrepancy making it necessary to hold "that the later Act has to some extent modified something found "in the earlier Act." In the present case it is in my judgment appropriate to read section 5 of the Act of 1946 (which I will refer to as "section 5") and then in relation to that section to read section 11 of the Act of 1949 (which I will refer to as "section "11") and to decide what is the outcome.

If the words in section 11 (1) are considered in isolation they are wide enough to cover cases where contracts have been referred to a tribunal by the lessor or by the lessee or by the local authority. Section 5 refers to a reference by the lessee or by the local authority only. The words of section 11 (1) are wide enough to cover a notice to quit served at any time after there has been a reference which has not been withdrawn. Section 5 refers to a notice to quit served before the decision of the tribunal is given or within three months thereafter. The words of section 11 (1) are wide enough to cover a notice to quit served either by the lessor or by the lessee. Section 5 refers to a notice to quit served by the lessor on the lessee.

If, therefore, the words of section 11 (1) are taken by themselves a very wide jurisdiction would be bestowed. If a contract was referred to a tribunal by a lessee, and if no change in the rent payable was ordered, and if some years later a notice to quit was served—then, on an application by the lessee, the tribunal would have power, within subsection (2), to postpone the date at which the notice to quit would have effect. This is by no means an impossible result even though it might be regarded as a surprising one. The inquiry remains as to what Parliament has enacted.

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[8] (1883) 8 App.Cas. 723, 727.

It can with force be submitted that if a tribunal is being endowed with wide powers to delay the operation in certain events of notices to quit some statutory conditions would be prescribed to control, or at least to guide, the exercise of the jurisdiction. But the absence of any such directions would be of no relevance if by enactment the jurisdiction has been clearly given.

The requirement that section 11 must be construed as one with the Act of 1946 makes it inappropriate to consider the words of section 11 (1) in isolation. The phrase "at any time when a "notice to quit has been served and the period at the end of "which the notice takes effect . . . has not expired" refers, in my judgment, to the period between the serving of a notice to quit and its time of taking effect. But the words "a notice "to quit" are not explained. It is not specified by whom the notice is to be given nor is there any mention as to the time of its service. This omission is explained if the reference is to a notice to quit as specified in the Act of 1946. It is only in section 5 in the Act of 1946 that a notice to quit is referred to. The phrase "a notice to quit" in section 11 in my judgment denotes a notice to quit of the particular kind set out in section 5, that is, a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given, or within three months thereafter.

The important words in section 11 are as follows: ". . . at "any time when a notice to quit has been served and the period "at the end of which the notice takes effect (whether by virtue "of the contract, of the Act of 1946 or of this section) has not "expired . . ." If the period at the end of which "the notice" takes effect is being fixed by virtue of the Act of 1946—it is plain that "the notice" referred to is a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. It is a notice to quit of the same kind which, in my judgment, is referred to if the period at the end of which the notice takes effect is being fixed by virtue of the contract or by virtue of section 11.

The situation denoted by section 5 is that following a reference to a tribunal by a lessee or by a local authority a notice to quit is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. In that situation there is, if necessary, an automatic delayed operation of the notice to the expiration of such period of three months unless the tribunal shortens the period. The effect of section 11, in my judgment, is that in the same situation there may be an application (unless the tribunal has shortened the period) to extend that period and to extend an extension and also to extend the period of notice if the expiry date of the notice to quit is later than the expiration of three months after the decision of the tribunal.

It is in keeping with this view of the matter that section 11 should contain the words "and the reference has not been withdrawn." Proviso (*b*) to section 5 is in these terms: "If the reference is withdrawn the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference." As section 5 has dealt with the situation where a reference has been withdrawn, no need arises to make any enactment by the terms of section 11. This reinforces the view that section 11 is concerned with the situation denoted by section 5.

I have therefore reached the conclusion that the effect of the two sections read together is that where a notice to quit has been served in the circumstances laid down in section 5, and where the reference has not been withdrawn, the lessee may before the expiry of the three months' period (provided that such period applies) or within the currency of the notice, apply for an extension of the period at the end of which the notice takes effect and may from time to time apply for extensions of a period which has been extended under section 11. For these reasons I am in agreement with the judgments delivered in the Divisional Court.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Ministry of Health; Neve, Beck & Co., for Joseph Davies & Son, St. Helens.*

A. W. G.

C. A.

1952
May 20.

Somervell, Jenkins and Morris L.JJ.

SAYCE *v.* AMEER RULER SADIG MOHAMMAD ABBASI BAHAWALPUR STATE.

[1950 S. No. 2325.]

International Law—Sovereign ruler of foreign State—Immunity—Ruler of a Pakistan State—Certificate of Commonwealth Relations Office —Immunity from process although sovereignty limited by statute— Government of India Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 42)—*Indian Independence Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 30).

A writ issued by the plaintiff claiming damages for alleged breach of contract from the defendant, described as the Ameer Ruler of Bahawalpur State (which prior to the passing of the Indian Independence Act, 1947, and the accession of that State to the Dominion of Pakistan, had been an independent Indian State) was set aside by a judge in chambers on the ground that the defendant was entitled to immunity from process as the ruler of a foreign sovereign State. There was before the learned judge a letter from the Commonwealth Relations Office which stated that the State of Bahawalpur was not a part of His Majesty's Dominions and that the Ameer, within the limitations imposed upon him by the constitutional arrangements contained in the instruments of accession to Pakistan, was sovereign ruler of the State. On appeal by the plaintiff:—

Held, that the question of the personal immunity of a ruler, equally with that of the immunity of a State, was one for determination by His Majesty's Government and not by the courts of this country; that the Commonwealth Relations Office was the appropriate department to declare the view of the British Government and the court was bound to treat the letter of the department as decisive.

Dicta of Lords Cave and Finlay in *Duff Development Co. Ld.* v. *Government of Kelantan* [1924] A.C. 797, 808 and 815; and of Lord Atkin in *Government of the Republic of Spain* v. *ss. Arantzazu Mendi* [1939] A.C. 256, 263, applied:—

Held, further, that there was ample justification in the instruments of accession to justify the conclusion that the limitations imposed upon the sovereignty of the Ameer had no application over a very substantial sphere.

Decision of McNair J. [1952] W.N. 62 affirmed.

APPEAL from McNair J.[1]

The plaintiff Sayce issued on May 24, 1950, a writ claiming from the defendant, described as the Ameer Ruler of Bahawalpur State, formerly an independent Indian State, damages for alleged breach of contract. The writ was served on the defendant, who entered a conditional appearance to it and took out a summons asking that the service of the writ be set aside. The summons was heard on October 13, 1950, by Master Grundy, who ordered that the service of the writ be set aside on the ground that the defendant was entitled to immunity as the ruler of a sovereign State.

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[1] [1952] W.N. 62.

The plaintiff appealed to McNair J. in chambers, who adjourned the summons into open court. There was before the court a letter dated September 4, 1951, from the Commonwealth Relations Office which stated that until August 15, 1947, his Highness the Ameer of Bahawalpur was recognized by His Majesty as the ruler of that State, which was under the suzerainty of His Majesty; but that that position of the State of Bahawalpur was altered by the Indian Independence Act, 1947, and the Government of India Act, 1935, as modified by the provisions of the Act of 1947. The letter outlined the constitutional position of the Ameer and of his State as a result of an instrument of accession to Pakistan dated October 3, 1947, and certain further instruments (one dated April 29, 1951) which the Ameer had executed in pursuance of section 6 of the Government of India Act, 1935 (as modified), which created a Federation to consist of the territories of the Dominion of Pakistan and such Indian States as might accede to the Federation under section 6. The final paragraph of the letter stated:—" In these circumstances I am " to say that the State of Bahawalpur is not a part of His " Majesty's Dominions, and that the Ameer, within the limita- " tions imposed upon him by the constitutional arrangements set " out above, is sovereign ruler of the State."

McNair J. affirmed the finding of the Master. In his view the statement of the Commonwealth Relations Office precluded him from considering the difficult question of the status of component parts of the Federation, or how far the recognition accorded in the present case was consistent with the recognition accorded to Pakistan as reported in *Kahan* v. *Pakistan Federation.*[2] His Lordship relied on the decision of the House of Lords in *Duff Development Co. Ld.* v. *Government of Kelantan.*[3]

The plaintiff appealed.

Chinna Durai for the plaintiff.

J. Scott Henderson Q.C. and *H. G. Garland* for the defendant

The arguments sufficiently appear from the judgment.

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[2] [1951] 2 K.B. 1003.

[3] [1924] A.C. 797.

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SOMERVELL L.J. stated the facts and continued:—Before I deal with the facts I propose to read one or two passages, on which the learned judge relied in his judgment, from the decision of the House of Lords in *Duff Development Co. Ld.* v. *Government of Kelantan*,[4] which was, of course, the well-known case which raised a question with regard to the immunity of the State of Kelantan. Lord Cave said: "No doubt the engagements "entered into by a State may be of such a character as to limit "and qualify, or even to destroy, the attributes of sovereignty "and independence: Wheaton, 5th ed., 50; Halleck, 4th ed., 73; "and the precise point at which sovereignty disappears and "dependence begins may sometimes be difficult to determine. "But where such a question arises it is desirable that it should "be determined, not by the courts, which must decide on legal "principles only, but by the government of the country, which "is entitled to have regard to all the circumstances of the case. "Indeed, the recognition or non-recognition by the British "Government of a State as a sovereign State has itself a close "bearing on the question whether it is to be regarded as sovereign "in our courts." Then he refers to the declaration in that case. Lord Finlay said: "It might be said that there was a want of "candour in merely stating the conclusion that the Power is a "sovereign power without disclosing any such limitations on the "sovereignty as exist here. The contention that by appending "these documents"—they were treaties and acknowledgments between His Majesty's Government and the Ruler of Kelantan— "the Colonial Office remits the question to the court to form its "own opinion upon it, is based on a misconception. When the "letter and the documents are read together it is clear that "the Secretary of State says explicitly that the Sultan is a "sovereign ruler, and the documents are appended by way of "making it clear that their effect has been considered and that "the Colonial Office has given all due weight to them in arriving "at the conclusion that the Sultan is a sovereign prince." He then, after considering the limitations of sovereignty, says this: "While there are extensive limitations upon its independence, "the enclosed documents do not negative the view that there "is quite enough independence left to support the claim to "sovereignty. But, as I have said, the question is not for us at "all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by

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[4] [1924] A.C. 797, 808, 815.

"whose opinion the courts of His Majesty are bound to abide." Lord Sumner in his speech in that case expressed a somewhat different view, or, at any rate, he contemplated that, in the absence of any clear answer from His Majesty's Government, the court would proceed on legal principles.

That difference of approach was considered in the *Government of the Republic of Spain* v. *s.s. Arantzazu Mendi*,[5] a case in which immunity was claimed, which turned on the question as to which of the rival Governments of Spain at that time was recognized as the de facto Sovereign of a certain area. The question, of course, does not help us, but Lord Atkin in his speech said: "On the question whether the Nationalist Government of Spain was a foreign sovereign State, Bucknill J. took "the correct course of directing a letter, dated May 25, 1938, to "be written by the Admiralty registrar to the Secretary of State "for Foreign Affairs, asking whether the Nationalist Government "of Spain is recognized by His Majesty's Government as a "foreign sovereign State. I pause here to say that not only is "this the correct procedure, but that it is the only procedure "by which the court can inform itself of the material fact "whether the party sought to be impleaded, or whose property "is sought to be affected, is a foreign sovereign State. This, "I think, is made clear by the judgments in this House in the "*Kelantan* case.[6] With great respect I do not accept the opinion "implied in the speech of Lord Sumner in that case that recourse "to His Majesty's Government is only one way in which the "judge can ascertain the relevant fact. The reason is, I think, "obvious. Our State cannot speak with two voices on such a "matter, the judiciary saying one thing, the executive another. "Our Sovereign has to decide whom he will recognize as a fellow "sovereign in the family of States; and the relations of the "foreign State with ours in the matter of State immunities must "flow from that decision alone." In that case, as in the *Kelantan* case,[6] the court was dealing with State immunity as distinct from the personal immunity of a ruler, but in my opinion the principles laid down there with regard to the proper approach to a case of this kind and the necessity for the court to obtain and act on information from His Majesty's Government in the United Kingdom are applicable.

In this case communication was made to and answers were received from the Commonwealth Relations Office. Mr. Chinna

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[5] [1939] A.C. 256, 263.

[6] [1924] A.C. 797.

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Durai put before us a clear argument distinguishing this case from the earlier cases, and he sought to distinguish the letter in this case from the letters which were referred to in earlier cases on two grounds. In the first place, he submitted, I think, that the Commonwealth Relations Office has not the authority or the finality in this regard of the Foreign Office with regard to foreign countries, or as the Secretary of State for India had with regard to questions within his jurisdiction, or the Colonial Secretary with regard to Colonial matters. He also—and I shall have to come back to this—submitted that the letter on its face was unsatisfactory and the conclusions in it inconsistent with the earlier matters referred to, and in any case on one particular matter he invited us to seek further information. I will deal with the first point before I come to the latter point.

I think that the Commonwealth Relations Office are the proper Ministry in this country for this court to approach and to inform this court in a matter such as that with which we are concerned, namely, the question of a ruler—and I do not beg any question by calling him a ruler—the limitations on whose sovereignty—and it is admitted there are some limitations—arise out of his relations with the Dominion of Pakistan. Nor do I think there is any ground for criticism in the fact that the Commonwealth Relations Office, having been approached by this court, communicated to this court, among other things, the views of the Pakistan Government. That Government had come to an arrangement, as will be seen, with the Ruler of Bahawalpur State, and I think it would be contrary to all principles of the Commonwealth that they should not be communicated with. I think they were in an authoritative position to assist the court, through the Commonwealth Relations Office, in the decision of this question. Coming to the letter, it states at the outset (and this is not disputed) that prior to 1947 his Highness, that is the defendant, was recognized by the Government of India "as the Ruler of the "State of Bahawalpur, which was under the suzerainty of His "Majesty. The territory of the State was not part of British "India or of His Majesty's Dominions and neither the Ameer nor "his subjects were subjects of His Majesty." Then there is a reference to the case of *Statham* v. *Statham and the Gaekwar of Baroda* [7] in which it was held that the then Gaekwar of Baroda was a sovereign prince and immune from procedure, and prior to 1947 the present defendant would have been in the same

[7] [1912] P. 92.

position. The letter then proceeds to go through the constitutional changes which have happened since 1947 with references to the Government of India Act, 1935, which, as modified, is still operative in Pakistan. The letter concludes with this paragraph: "In these circumstances I am to say that the State of "Bahawalpur is not a part of His Majesty's Dominions, and "that the Ameer, within the limitations imposed upon him by "the constitutional arrangements set out above, is sovereign "ruler of the State."

Having come to the conclusion that on the facts of the present case the statement by the Commonwealth Relations Office is in precisely the same position as the statements referred to in the earlier cases, that would seem to dispose of the matter and to justify the learned judge's conclusion, but out of deference to the argument I will deal, as indeed in most of the other cases the court has dealt, with the various matters which determine the position of the ruler and where, in this class of case, the limitations of sovereignty are to be found. They are referred to in the letter. I agree with the learned judge when he says: "In my judgment the final paragraph of the letter of September 4, 1951, contains a clear and unequivocal statement made "on behalf of His Majesty on two points: (1) that the State "of Bahawalpur is not part of His Majesty's Dominions, and "(2) that the Ameer within the limitations imposed upon him "by the constitutional arrangements set out in the letter is "sovereign ruler of the State."

I now come to the history of the changes. By the Indian Independence Act, 1947, as from August 15, 1947, two independent Dominions were to be set up in India to be known respectively as India and Pakistan. I should, in passing, refer to section 2 (4), which says: "Without prejudice to the generality "of the provisions of subsection (3) of this section, nothing in "this section shall be construed as preventing the accession of "Indian States to either of the new Dominions." We are concerned only with Pakistan. [His Lordship then read section 7 of the Act of 1947 [8] and continued:] Under that Act it was provided that the Government of India Act, 1935, applied in the

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[8] Indian Independence Act, 1947, s. 7: "(1) As from the appointed day "—(a) His Majesty's Government in "the United Kingdom have no responsibility as respects the government of any of the territories "which, immediately before that day, "were included in British India; (b) "the suzerainty of His Majesty over "the Indian States lapses, and with "it, all treaties and agreements in "force at the date of the passing of "this Act between His Majesty "and the rulers of Indian States,

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Dominion with such modifications as should be made according to the terms of the Act.

We have before us the Government of India Act, 1935, as adapted by the Pakistan Provisional Constitution Order. There was a Governor-General appointed by His Majesty by warrant of the Royal Sign Manual. Part II refers to the Federation of Pakistan. That adopted and adapted the provision for Federation by the Indian States which was contained in the Act of 1935, though that Federation never became effective. It provides that "As from the fifteenth day of August, 1947, there "shall be united in a Federation by the name of Pakistan (a) the "Provinces hereinafter called Governor's Provinces, (b) the "Provinces hereinafter called Chief Commissioners' Provinces" —with which we are not concerned—and "such Indian States "as may accede to the Federation in the manner hereinafter "provided." Bahawalpur did accede and there was an earlier Instrument of Accession and a later Instrument of Accession. One of the questions to which the learned judge addressed his mind was whether he had to consider the matter as at the date of the writ or as at the date of the hearing before him. That was relevant, because undoubtedly the powers parted with under the second or supplemental Instrument of Accession, which was after the writ, are greater than those parted with under the earlier Instrument. The learned judge decided that he ought to address his mind to the position as at the date of the hearing, that is, after the later Instrument of Accession, and that was not challenged before us and I will therefore adopt the same principle.

Turning to the supplementary Instrument of Accession, that proceeds on the not unfamiliar lines of having a schedule in three parts setting out the various possible subjects of legislation. In Part I are the subjects which are exclusively Federal subjects; in Part II are the subjects which are prima facie concurrent subjects for legislation; and Part III, subject to certain powers, prima facie State subjects. Mr. Chinna Durai rightly drew attention to the fact that under this Instrument the ruler is declaring that "any change which may be made hereafter by "competent authority in the aforesaid lists, in their application

"all functions exercisable by His "Majesty at that date with respect "to Indian States, all obligations of "His Majesty existing at that date "towards Indian States or the rulers "thereof, and all powers, rights, "authority or jurisdiction exercisable "by His Majesty at that date in or "in relation to Indian States by "treaty, grant, usage, sufferance or "otherwise."

"to the Federation of Pakistan, shall have effect in relation to "this State in such wise that the respective Part of the said "Schedule shall be deemed to have been modified, in like manner "as the corresponding list, and with effect from the same date." Of course, such a change might radically alter the position, but we have to consider the matter before any such change has been made. There was a further agreement with regard to possible future alterations of the provisions of the Constitution Act. Paragraph 9 says: "Nothing in the Second Supplementary "Instrument affects the continuance of my sovereignty in and "over this State, or, in exercise of any powers, authority, rights "and jurisdiction now enjoyed by me as ruler of this State or "the validity of any law at present in force in this State, save "as provided by the Second Supplementary Instrument."

It is unnecessary, in my view, to go through the various subjects in Part I and Part II or in any detail in Part III, but in Part III, which are prima facie State subjects, one finds public order (excluding the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organization of all courts, except the Federal Court; police; prisons; compulsory acquisition of land; local government and public health. In my opinion there is ample justification in that document for the learned judge's conclusion that "An examination of the Constitutional "arrangements set out in the letter satisfies me that today the "limitations imposed upon the Ameer's sovereignty have no "application over a very substantial sphere." In making this examination I am being in no way inconsistent with the principles which I cited from the *Kelantan* case.[9] In that case they also examined the relations which existed between His Majesty's Government and the Government of Kelantan, and it is proper, I think, that they should be explained and in any necessary document set out by the relevant Government department to assist the court. It enables one to see that the proper matters have been considered and have been before the proper Ministers.

That, I think, disposes of the argument, except with regard to one matter which was raised before the learned judge and before us. On April 30, 1950, which was some eight days before the Supplementary Instrument of Accession to which I have been referring, there was passed the Pakistan Citizenship

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[9] [1924] A.C. 797.

Act, 1951, It provided for Pakistan citizenship, and by section 13 it said: "If any territory becomes a part of Pakistan the "Governor-General may, by order, specify the persons who shall "be citizens of Pakistan by reason of their connexion with that "territory; and those persons shall be citizens of Pakistan from "such date and upon such conditions, if any, as may be specified "in the order. (15) Every person becoming a citizen of Pakistan "under this Act shall have the status of a Commonwealth "citizen." The Act here which deals with that matter now is, of course, the British Nationality Act, 1948. The Pakistan Citizenship Act was referred to also in the letter, and the letter proceeds on the basis which would be favourable to Mr. Chinna Durai's argument: "Under the Pakistan Citizenship Act, 1951, "the subjects of the Ameer have now in general also become "citizens of Pakistan, while remaining subjects of the ruler."

They have, therefore, two citizenships: their local citizenship under which they owe allegiance to their ruler, and they also are Pakistan citizens with its consequential status under the Act of 1948 as British subjects or Commonwealth citizens. At one time Mr. Chinna Durai argued that we ought to assume that under that Act the ruler has himself become a citizen of Pakistan. That is not stated in the letter, and I cannot think that that would be the result. But assuming that it was so, and he became a Pakistan citizen, it seems to me that it would be impossible to regard that as affecting his status as declared in the revised Instrument of Accession signed only some eight days later. The position, of course, in this case, as in so many of the earlier cases which have come before the courts, is sui generis, but I can find nothing in any of these documents, or in the Citizenship Act, which would lead this court to decide against the general principle upon which the House of Lords has stated our courts must act, namely, to accept as final, in a matter of this kind, the declaration of the appropriate Government department. For these reasons I would dismiss the appeal.

JENKINS L.J. I agree, and have nothing to add.

MORRIS L.J. I agree.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Stanley Johnson & Allen; Seagrove, Woods & Simmons.*

A. W. G.

STREET AND ANOTHER *v.* BRITISH ELECTRICITY AUTHORITY AND ANOTHER.

[1951 S. 110.]

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Feb. 26,
27, 28.

Singleton,
Birkett and
Morris L.JJ.

Factory—Electricity generating station—Part operating, part in possession of construction contractors—Accident to contractors' employee—Liability—"Place situate within close, curtilage or "precincts forming a factory . . . used for . . . purposes other than "processes carried on in . . . factory"—Not part of factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (6).

On April 12, 1950, a steel erector and acetylene burner was fatally injured by a fall in a power station of the British Electricity Authority at Cliff Quay, Ipswich. At the time of the accident, part of the station was operating and part was under construction. A tarpaulin had been put up between the part of the station where construction work was in progress and the operating part. The deceased man was an employee of the construction contractors. He was returning from his lunch along a gallery which formed the second floor of the power station building and, having come through a partition in the tarpaulin, was crossing a bay of the building where construction men had been operating a hoist when, apparently, he tripped, fell over the edge of the gallery and was killed. No-one saw him fall, but he fell close to a place where the floor of the gallery was partly obstructed by building materials and by a truck standing on a trolley-track, and it appeared that when he fell, he was attempting to pass these obstructions by going close to the edge of the gallery.

His administrators claimed damages against the British Electricity Authority and the contractors under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging that the defendants had been negligent and that they had committed breaches of duties imposed by the Factories Act, 1937, and the Building (Safety, Health and Welfare) Regulations, 1948. On appeal from Sellers J. who dismissed the action:—

Held, (i) on the facts, that negligence at common law had not been proved against either of the defendants.

(ii) The Factories Act, 1937, did not apply, for, although the power station as a whole was within the Act, the place where the accident occurred was being used for a purpose other than that of generating electricity and so, by virtue of section 151 (6) that place was not part of the "factory" for the purposes of the Act. Further, there was no evidence which would justify a finding that it was a separate "factory." In construing section 151 (6), the words "close, curtilage, or precincts forming a factory" must be taken to apply to the whole of the factory premises including the main factory building. Dictum of Wynn-Parry J. in *Cox* v. *Cutler & Sons Ld.* (1948) 46 L.G.R. 517, 524 approved.

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APPEAL from Sellers J.

Sydney Frank Street, an acetylene burner and steel erector, was fatally injured on April 12, 1950, when he fell 45 feet from a gallery forming the second floor of an electricity generating station of the British Electricity Authority, known as New Power Station, Cliff Quay, Ipswich. At the time of the accident the second defendants, Messrs. Babcock and Wilcox Ld., were engaged as contractors in erecting a series of nine boilers. Five of the boilers had been erected and were already operating generating electricity. Each boiler stood in a separate bay of the building and the five bays in which the boilers were working were divided by a tarpaulin from the other four bays (bays 6 to 9) where construction work was being done, and it was said by the station engineer for the British Electricity Authority that the tarpaulin was erected in order so to divide the building.

The deceased man, an employee of the contractors, was engaged in erecting a boiler in bay 9. He was returning from his lunch along a gallery which ran throughout the building beside the boilers or the spaces in which the boilers were to be erected. He passed through a partition in the tarpaulin and was going through bay 7 when he fell over the unfenced edge of the gallery into the space where the boiler would ultimately be put and was killed. In bay 7, the gallery was about 28 feet wide but part of the floor was occupied by building materials which had been brought up from the floor of the building by a hoist which was working in that bay to the edge of the gallery over which the deceased fell. A trolley-track ran three feet from the edge of the gallery, and, at the time of the accident, a truck was standing on the track nearly opposite to the building materials dumped on the floor between the track and the gallery wall. It was said for the plaintiffs that the materials, which occupied much of the floor space, made it difficult for anyone to use the gallery in order to walk from one part of the building to another, and it was suggested that the deceased was attempting to pass between the truck and the unfenced edge of the gallery, thus avoiding the materials on the other side of the truck, when, apparently (for no one actually saw the accident), he tripped and fell over the edge about 4 feet before reaching the truck. The floor of the gallery at that point was rough and pieces of metal were protruding from it, but there was a worn track between the edge of the gallery and the trolley-track and it was said that the men going along the gallery were in the habit of passing that way. The deceased

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was said to be a careful man, and he had been working there for a long time.

The deceased's administrators, his widow and brother, brought an action against the British Electricity Authority and the contractors, claiming damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging that the British Electricity Authority were in breach of sections 25 (1), 25 (3) and 26 (1) of the Factories Act, 1937,[1] and that they were negligent in failing to give any or any sufficient warning of the danger arising from the unguarded opening, the condition of the floor, and the presence of the obstructions, or any of those circumstances. Further, they claimed that the contractors were in breach of regulation 30 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145),[2] in failing to fence an opening in the floor of the gallery, and that they were negligent.

Sellers J. held, in dismissing the action, that it was impossible to conjecture how the accident occurred and therefore it was impossible to decide where liability lay. On the facts he was not prepared to find that there had been any breach of statutory or common law duties which might have caused the accident. The Factories Act, 1937, did not apply, for though the generating station was within the Act, the place where the accident occurred was, by section 151 (6), not part of that "factory," and there was no evidence which would justify a finding that it was a separate factory.[1]

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[1] Factories Act, 1937, s. 25 (1): "All floors, steps, passages and gang- "ways shall be of sound construction "and properly maintained."

Subs. (3): "All openings in floors "shall be securely fenced, except in "so far as the nature of the work "renders such fencing impracticable."

S. 26 (1): "There shall, so far as "reasonably practicable, be provided "and maintained safe means of access "to every place at which any person "has at any time to work."

S. 103 (1): "The provisions of the "Act shall apply to any premises in "which persons are regularly em- "ployed in or in connexion with the "processes or operations of generating, "transforming . . . electrical energy ". . . as if the premises were a fac- "tory and the employer of any person "employed on the premises in or in "connexion with any such process or "operation were the occupier of a "factory."

S. 151 (6): "Where a place situate "within the close, curtilage or pre- "cincts forming a factory is solely "used for some purpose other than "the processes carried on in the fac- "tory, that place shall not be deemed "to form part of the factory for the "purposes of this Act, but shall, if "otherwise it would be a factory, be "deemed to be a separate factory."

[2] Building (Safety, Health and Welfare) Regulations, 1948, reg. 30: "(1) Subject to paras. (5) and (6) of "this reg. every accessible opening in ". . . the floor of a building, working "platform, gangway or run, through "which any person is liable to fall a "distance of more than 6 feet "6 inches, shall be provided with— "(*a*) a suitable guard-rail or guard- "rails . . . so placed as to prevent "so far as possible the fall of persons ". . . through the opening; or (*b*) a "covering . . . (5) guard-rails . . . "and coverings required by para. (1) ". . . may be removed or remain "unerected . . . (*b*) for the time and "to the extent necessary for . . . "movement of materials."

With regard to regulation 30 of the Building Regulations of 1948 he said that for regulation 30 to apply "it would have to be "established that the contractors were engaged on the construc- "tion, structural alteration, repair, or maintenance of a building, "and it was submitted that that was not the case. There is no "very precise definition or any well-established authority as to "what is a 'building,' but I should have thought that the con- "tractors were not engaged in constructing a 'building,' but in "placing plant or machinery within that building . . . the build- "ing was constructed, and, as I understand what was being "done, the contractors were engaged in erecting an elaborate and "large type of plant, but nevertheless erecting plant within a "building, rather than a 'building' itself." He added subsequently: "I should have found great difficulty I think in "finding any breach of duty here unless it had been under the "Building Regulations which would have required more careful "consideration."

The plaintiffs appealed.

Jellinek for the plaintiffs. The contractors committed a breach of their common-law duty to their employee in failing to take reasonable care so as not to subject him to unnecessary risks. Admittedly no one saw him fall and Sellers J. said that as it was impossible to say what was the cause of the accident, it was not possible to say who was liable, but it was not, as he said, a matter of conjecture but of reasonable inference from known facts that the safe side of the truck was obstructed and that the deceased went to the offside, tripped on the rough ground between the track and the edge of the gallery and so fell over the edge. It may have been possible for a man to have squeezed past between the obstruction and the truck, but it was not reasonable to expect anyone to do so. Further, his employers were negligent in not protecting him from the danger of this obvious alternative route on the other side of the track. The common-law duty owed by the occupiers of the factory to the deceased was that of invitor to invitee. It was a duty to warn him of any traps of which they knew or ought to have known and it was less stringent than the duty which his employer owed to him. The narrow margin was a dangerous trap because it had been used so often that its dangerous character was overlooked by the men who, judging from the worn track, were in the habit of passing that way.

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[1] For footnote 1, see p. 401.

Secondly, the British Electricity Authority, as occupiers of the electricity generating station, were liable under the Factories Act, 1937, because the premises as a whole were within the Act by virtue of section 103, although, at the material time, only part of the station was working to generate electricity. [Counsel referred to *Barrington* v. *Kent Rivers Catchment Board*.[3]] It was argued before Sellers J. that the place where the accident occurred (bay 7) was excluded from the Act by section 151 (6), but, on the true construction of that subsection, bay 7 was not a " place within the close, curtilage or precincts " forming this " factory," for it was part of the factory building itself. This construction of section 151 (6) was favoured by Lord Alverstone C.J. in *Lewis* v. *Gilbertson & Co. Ld.*[4] I admit that in *Cox* v. *Cutler & Sons Ld.*,[5] Wynn-Parry J. said that he found it difficult so to construe section 151 (6), but his remarks and those of Lord Alverstone were obiter and the point has not therefore really been decided.

[SINGLETON L.J. The sections imposing the liability on the factory occupier are penal sections and, if there is a doubt as how they should be construed, they should be construed against the the commission of an offence.]

It was contended that the tarpaulin was erected to divide the part of the " factory " which was operating from the part under construction, but the purpose of the division does not have to be considered if I am right on the construction of section 151 (6). If, however, that point is decided against me, I submit on the facts that the evidence as to the purpose of the tarpaulin was worthless and in all probability the tarpaulin was merely intended to keep dust out of the operating area.

Assuming that the Factories Act, 1937, applies, the onus of proving that a breach of statutory duty was not the cause of the accident shifts to the employer. [He referred to *Vyner* v. *Waldenberg Brothers Ld.*[6]] Here the circumstances point to a breach of the statutory duties imposed by section 25 (3) and section 26.

This accident would have been avoided if the employers had removed the obstructions or had erected a fence. They alleged that it was not practicable to fence the opening in the floor because of the hoist which was operating there but, as a fence was erected immediately after the accident, it evidently was practicable.

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[3] (1947) 64 T.L.R. 35.

[4] (1904) 91 L.T. 377, 379.

[5] (1948) 46 L.G.R. 517.

[6] [1946] K.B. 50, 55.

H. Burton Q.C. and *J. W. Russell* for the contractors. The contractors are not liable, for the duties imposed by section 25 (3) and section 26 of the Act were not imposed on employers but on the occupier of a factory. The duty of the contractors, as employers of this workman, was to take reasonable care not to subject him to unnecessary risks and that had been done. Sellers J. found that the floor was safe for the purposes for which it was required [counsel referred to *Mayne* v. *Johnstone and Cumbers Ld.*[7]] and that a safe means of access had been provided.

Hines for the British Electricity Authority. The British Electricity Authority, as occupiers of the power station, are not liable for breaches of duties imposed by the Factories Act, 1937, because the place where the accident occurred was taken out of the "factory" to which the Act applied by section 151 (6). The area of the factory in which construction work was being done was separated by the tarpaulin from the rest of the factory, and the area so shut off was sufficiently definite to be a "place" for the purpose of section 151 (6). The words "close, curtilage or precincts forming a factory" cover not only the yards or outbuildings of a factory but the factory building itself. The part of the building where the accident occurred was gradually being converted to a generating station but at the material time that part was being used only for the work of installation and not for the generation of electrical energy, the purpose for which the factory as a whole was being used. Consequently section 151 (6) applies to exclude this part of the factory and, as there is no evidence on which it could be found to be a separate factory, the Act does not apply.

Assuming against me that the Act does apply, there is no breach of duty under section 25 (3), for this is not an "opening in the floor" but the edge of the floor. Further on the evidence, although it was found practicable to fence the opening after the accident had occurred, that was because most of the heavy materials had by that time already been brought up. It was not practicable, though it may perhaps have been possible, to fence the gallery immediately before the accident, and indeed to have done so would probably have enhanced the danger rather than have removed it.

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[7] [1947] 2 All E.R. 159.

As to section 26 (1), Sellers J. found on the evidence that a safe means of access had been provided on the other side of the truck. There was ample evidence to support that finding and that the deceased could, if he wished to do so, have squeezed past the truck on the safer side. The mere fact that the accident happened does not prove conclusively that the means of access used by the deceased was unsafe, for it had been used many times before quite safely. In deciding whether the means of access had been made safe in so far as is reasonably practicable, as required by section 26 (1), it is important to bear in mind the type of work being done and the sort of working conditions that the contractors' men were used to. The test is whether the means of access is free from unusual dangers so that it is of such a character that men, of the type which a reasonable employer would expect to find using that means of access, would not be likely to be exposed to danger by reason of its nature or condition. Mr. Jellinek has submitted that where an accident occurs in circumstances which are consistent with a breach of duty, the onus of disproving that breach is on the employer, but I submit that is not so; if that were the position employers and occupiers of factories would be in the position of insurers.

Jellinek in reply. The defendants were negligent in not providing a safe means of access. The 3 feet margin between the track and the edge of the gallery was a trap. Either one or the other of the defendants were liable and should have warned the deceased or have fenced the edge. The British Electricity Authority were liable as occupiers of this part of the building although the contractors were working there, for the contract between the British Electricity Authority and the contractors indicates that the contractors had not exclusive possession of the part of the factory in which they were working; that implied that the British Electricity Authority had retained possession and were occupiers of the factory. The erection of the tarpaulin was not a sufficient indication that the contractors were to have exclusive possession.

As to section 26 (1), it is not relevant to show that a means of access is safe for particular persons. Either it is a safe way or it is not.

[BIRKETT L.J. But the standard of safety must be related to the kind of persons going there; it could not, for example, be the standard necessary for a rheumatic judge of the High Court.]

Mr. Hines submitted that a safe means of access was provided on the wall side of the truck; but section 26 requires that a safe means of access must be provided to any place where workmen have to go. More than one means of access may be provided, but, however many are provided, they must all be safe. The margin between the edge of the gallery and the track was clearly used as a means of access and should have been made safe. I submit that it was not safe, and that there was not sufficient evidence on which Sellers J. could have found rightly that it was safe.

SINGLETON L.J. [after stating the facts]: One difficulty which arises in this case is to ascertain what was the true position as between the British Electricity Authority and the contractors. Sellers J. accepted the evidence as to the reason for the placing of the tarpaulin between bays 5 and 6, and it would appear, at least, that some effort had been made to divide the building into two parts: first, the part in which electricity was being generated, and second, the part in which the contractors were installing boilers.

The contract under which the contractors were working was not before Sellers J., and no reference was made to it; nor was it referred to in this court until this morning, when one member of the court asked a question upon it. There might, however, arise questions in certain circumstances as to who was the occupier of the place at which this accident happened. The contract does deal with questions of that kind, but it may not be very helpful, as the only evidence on the point was that given by the station engineer. It will not be thought that I am criticizing counsel, for we have much appreciated the arguments put forward, and in particular the argument put forward on behalf of the plaintiffs in this case. It is a difficult case, and Mr. Jellinek has given us every help that we could expect.

First, I propose to deal with the duty at common law. The contractors, the employers of Street, were under a duty to adopt a safe system of working, or, at least, to take reasonable care so to do. The contract of employment places on the employer a duty of taking reasonable care to provide proper appliances, to maintain them in proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. That general statement of the duty is sufficient for all purposes.

The duty which the occupier of premises owes to an invitee upon the premises is stated in the well-known case of *Indermaur* v. *Dames*,[8] and I need say no more as to it. It is slightly less onerous than the duty owed by the employer to his workman, so that the inquiry as to the common-law duty can be determined by considering whether or not the employers in this case so carried on their operations, or took reasonable care so to carry on their operations, as not to subject those employed by them to unnecessary risk. In considering a matter of that kind, it is relevant to consider the work which was being done and the men who were employed. Sellers J. came to the conclusion that no breach of duty at common law was shown. He had all the evidence before him. The contractors had been working in this building for some time. They had a contract with the British Electricity Authority. I do not know to what extent they co-operated with the British Electricity Authority on safety matters. The men, including the deceased, who were returning to work on the second floor, had worked there a long time; they knew the way to their work; there was floor space which they could have used. Apparently from time to time they walked along the worn path about 3 feet wide between the line of trolley-rails and the bays in which boilers were to be put, and it looks to me as though Street was using that path when he fell over the edge into the space. The space was being used to house a hoist by which material was brought up for use in one part or another of the building. Sellers J. found that there was plenty of room for Street to have avoided that way. If it is said it was the duty of either of the defendants to have warned him that the track between the edge of the gallery and the trolley-rails was only three feet wide, and that there was a drop of 45 feet over the edge; the answer is that there was no purpose in a warning because he knew it; everyone knew it; he had used it many times, and others had, too. It appeared to the workmen to be a safe way to use; they used it, and it appears that no accident had ever happened until, for some reason which is unknown, this man fell over the edge. I agree with the finding of Sellers J. that it cannot be said on this evidence that the employers were failing in the duty which they owed at common law to their workmen in this regard; and I think it follows that the occupiers of this part of the premises, whoever they were, were not negligent in regard to the duty which they, as occupiers, owed to Street. That part of the claim fails, and on the way the case is put, the plaintiffs cannot succeed against the contractors.

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[8] (1867) L.R. 2 C.P. 311.

The claim against the British Electricity Authority, based on alleged breaches of the Factories Act, 1937, is much more difficult.

The first question is whether the place where this accident happened is a factory for the purposes of the Act of 1937. The interpretation section of the Act, section 151, defines what is meant by a "factory," but it is unnecessary to consider that definition because section 103 deals with electrical stations. [His Lordship read the section.] It was not submitted that the contractors were within the later words of section 103 (1). It is clear that a generating station, such as this, is a "factory" for the purposes of the Act of 1937.

[His Lordship read section 151 (6).] It is said on behalf of the British Electricity Authority that the place at which Street fell was taken out of the "factory" by section 151 (6), and that it ought not to be regarded as a "factory" for the purposes of the Act of 1937.

Mr. Jellinek, on behalf of the plaintiffs, submitted that subsection (6) did not apply at all. He drew attention to the fact that the opening words of that subsection are: "Where a place "situate within the close, curtilage, or precincts forming a "factory is solely used for some purpose other than the processes "carried on . . .", and he submitted that the place at which the accident happened was within the "factory" itself and was not within "the close, curtilage, or precincts," and he drew attention to the wording of subsection (1) of section 151.

My view is that, taking into consideration the words "forming "a factory" in section 151 (6), the words "where a place "situate within the close, curtilage, or precincts forming a "factory" ought to be regarded as covering the whole of the undertaking, inside and out, so long as the place is within the close, curtilage, or precincts forming a factory. Consequently, if a part of the building, as distinct from something in the yard or outside the building, is solely used for some purpose other than the processes carried on in the factory, it may be taken out of the "factory" by section 151 (6).

Section 149 (4) of the Factories and Workshops Act, 1901, which corresponds to this subsection in the later Act of 1937, was discussed by the Divisional Court in *Lewis* v. *Gilbertson & Co.*

Ld.[9] It was rightly said by Mr. Jellinek that that discussion was obiter, and the same may be said with regard to passages in one or two of the judgments in the case of *Cox* v. *Cutler & Sons Ld.*,[10] in which Wynn-Parry J., referring to the judgments in the Divisional Court in *Lewis* v. *Gilbertson & Co. Ld.*,[9] said[11]: "All three judgments proceed upon the basis that "'place' in section 151 (6) of the Act of 1937 means an area "outside the factory, though within the close, curtilage or pre-"cincts forming the factory. Lord Alverstone C.J. proceeded on "the basis that the 'place' was a place apart from the factory. "Wills J. treated it as a place entirely outside the factory area. "Kennedy J. held that a person on the new sheet mill site could "not be described as being upon the factory, although he might "have been upon the premises which were within the curtilage "and precincts of the factory. No doubt, on the facts of that "case, there was sound ground for holding that the site of the "new sheet mill had never formed part of the factory, and that "would be sufficient to support the decision. But, for myself, "I have great difficulty, in view of the language of section 151 (6) "of the Act of 1937, in accepting the view that, in order that "an area of land should qualify to be treated as a place within "that subsection, it must first be shown that it has never been "part of the particular factory. The wording of the definition "in subsection (1) makes the word 'factory' include not merely "the area comprised by the walls of a building in which a manu-"facturing process is carried on, but the whole area comprised "within the boundaries of, for instance, the close of the premises "in question. This appears to me to be borne out by the "wording of section 151 (6), where the 'close, curtilage, or "'precincts' are described as forming the factory. In my view "it follows that any area which is within the close, curtilage or "precincts of any premises, which are a factory within the "definition of that word in section 151, is qualified to be treated "as 'a place' under subsection (6), provided that it satisfies the "other conditions of the subsection as to user. I can find no "ground for concluding that the factory area, to employ the "phrase used in *Lewis* v. *Gilbertson & Co. Ld.*,[12] is less than "coterminous with the area comprised in the phrase 'close, "'curtilage, or precincts' of the premises, otherwise it would "be difficult to give any effect to the word 'deemed' in the "subsection."

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[9] 91 L.T. 377.
[10] 46 L.G.R. 517.
[11] Ibid. 524.
[12] 91 L.T. 377.

Respectfully, I agree with Wynn-Parry J. and I think that, by reason of section 151 (6), the place at which this accident happened is not within the "factory" for this purpose. Take the case of a large building erected so that factory processes could be carried out in it, and in one corner entirely separate from the other part, a factory process has been commenced. The whole building would not of necessity be within the factory legislation. It depends on the circumstances of each case.

The answer to the question must depend upon the facts. Sellers J. took that view, when he said: "Another issue which "was raised, on which I shall make some brief observation, is "that it was said on behalf of the Eastern Electricity Board that "they were under no duty under the Factory Acts to the deceased "man because they were, it was said, not the occupiers of the "premises for the purpose of the Factories Act; and reliance was "placed on section 151 (6) of the Factories Act"; Sellers J. read the subsection and added: "I find as a fact that the first five "boilers did form part of the factory but that this particular area, "shut off as it was, not by a permanent barrier, but by a tarpaulin "which was dividing the area where work was being carried out "by the contractors, fell within that subsection so that the area "was deemed not to form part of a factory, and I do not find "any evidence which would justify a finding that it was deemed "to be a separate factory."

That is a finding of fact. It is true that it was submitted this is not a question of fact but of the construction of section 151 (6); but one must look at the facts of each case. The finding of fact is based on the evidence of the station engineer, and I am disposed to agree with Sellers J. that the place at which this accident happened was not a factory or part of a factory.

In view of the importance of this case, it is desirable that I should say something on other points which were raised on behalf of the plaintiffs, though strictly it is not necessary. It was said by Mr. Jellinek that, if this was a factory, section 25 (3) of the Act applied. That subsection provides: "All openings in "floors shall be securely fenced, except in so far as the nature "of the work renders such fencing impracticable." It was submitted that the space into which Street fell was an "opening" in a floor, and that it ought to have been fenced. The marginal note to section 25 is: "Construction and maintenance of floors, "passages and stairs." Whether this was an opening in a floor within section 25 (3) is another very difficult question. The subsection is intended to provide that there must not be an open hole down which someone can fall: the occupier is under a duty to take steps to see that any opening in the floor is securely fenced, unless that is impracticable having regard to the nature of the work. It was submitted on behalf of the British Electricity Authority that this was not an opening in the floor. Mr. Jellinek submits that Street fell down an opening, an opening which was left in this space where the hoist was. A boiler was to be placed in that space, and had the boiler already been placed there, there would not have been a hole because the boiler would have filled it up. In one sense the space was the end of the floor and not exactly a hole in the floor. It is difficult to find an apt illustration, but we have all heard of someone in excitement walking off a platform. A person doing that does not fall down a hole; he falls over the edge; in that sense it might be said that Street did not fall through an opening in the floor, but fell over the edge of the floor. I have grave doubt whether this can properly be described as a hole in the floor or an opening in a floor; but it is not necessary to come to any final decision upon that point.

The other question raised is under section 26 (1) of the Act. [His Lordship read the subsection.] I assume that it was necessary for Street to go up to the second floor at the end of the building where the five boilers were already in operation, and thereafter to pass through or round the tarpaulin. When he did that, there was to the right of the set of trolley-rails a space 28 ft. wide, much, or some of which, was available to him. Evidence was given to show that that space was occupied to a large extent by various materials, but Sellers J. found that there was plenty of room for Street to pass between the truck and the gallery wall and that that was the normal way to go.

It was pointed out in the course of the argument that Sellers J. had said there was a well-marked pathway between the truck and the edge of the gallery. Sellers J. said: "Indeed, it appears "on the photograph that there was quite a well-trodden pathway "between the open side of the gallery and the railway line, and "I think this pathway was in good condition and was quite a "safe passageway." I am not sure that I should have so found. Section 26 requires in definite terms "safe means of access." It is said that that is a relative term. It is meant to secure, as far as possible, safety for men working and on their way to work. A man approaching his work may be thinking of his work; he may not be looking at the ground on which he is walking, and he may trip and fall. I think that a rail, or guard, of some sort would have saved this man's life. Having regard to the drop that was alongside this 3-foot way, I am not sure that I should have found that it was a safe means of access. I do not, however, think that matters, for, on the finding of Sellers J., there was a convenient way which was a safe means of access available to the man between the track and the gallery wall and he could have gone that way without going near the edge of the gallery. The duty of the employers or occupiers is to provide and maintain safe means of access. Safe means of access was provided between the track and the gallery wall; that is the finding of fact of Sellers J.; and although Mr. Jellinek submitted that that finding was not justified, I think it is impossible for this court to say that Sellers J. was not entitled so to find upon the evidence.

I desire to add this. [His Lordship read sections 25 (3) and 26 (1) of the Act of 1937.] It was said on behalf of the defendants that it was not practicable to have a guard or a fence as required by section 25, or section 26, and Sellers J. accepted that submission. The hoist was being used fairly continuously; it had been used for heavy materials, and the man in charge did not like heavy things hoisted to a level which might be dangerous. After this accident happened, a gate was erected in front of this open space. If that gate had been erected before April 12, 1950, I am inclined to think Street would have been alive today. I do not accept the learned judge's view that because of the nature of the work, or for any other reason, it was impracticable to erect it sooner. In a factory, at any place of this kind which it is known that men pass frequently, someone ought, I think, to put up a guard. It is important, in the interests of employers and workmen, that where two bodies are concerned, consideration should be given to that kind of thing: after all, if heavy material has to come up the hoist, it only means unfastening the gate, or taking down the barrier, if it is not desirable to raise the material over it. In my view, the duty created by sections 25 and 26 of the Act of 1937, if it exists, cannot be met by saying, "Well, it was "not very convenient." Those are not the words of the section.

For these reasons, I feel some regret that the only course which this court can take is to say that the appeal must be dismissed.

Birkett L.J. I agree with the judgment that has just been delivered by my Lord and I have no desire to contribute a judgment of my own. I agree that the appeal ought to be dismissed.

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MORRIS L.J. I also fully agree.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for Gotelee & Goldsmith, Ipswich; Bell, Brodrick & Gray, for Turner, Martin & Symes, Ipswich; Carpenters, for Birkett, Ridley & Bartley, Ipswich.*

E. D.

R. *v.* MANCHESTER LEGAL AID COMMITTEE.
Ex parte R. A. BRAND & CO. LD.

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Feb. 4,
5, 14.

Lord Goddard C.J., Jones and Parker JJ.

Legal Aid—Certificate granted to trustee in bankruptcy by legal aid committee—Whether committee subject to certiorari—Whether defendants in action are persons aggrieved—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *ss.* 1, 2, 4, 8, 12 (3)*—Legal Aid (Assessment of Resources) Regulations,* 1950 (*S.I.* 1950, *No.* 1358)*—Legal Aid (General) Regulations,* 1950 (*S.I.* 1950, *No.* 1359).

A debtor applied to a local aid committee, set up under the Legal Aid and Advice Act, 1949, for a certificate for legal aid to pursue a claim for alleged breach of contract against a limited company. Before the necessary certificate was granted, he was adjudicated bankrupt and a trustee in bankruptcy was appointed. Two days later, the bankrupt was granted the certificate, but it was discharged at his instance, as his claim had vested in his trustee in bankruptcy.

The trustee then applied for a legal aid certificate to continue the bankrupt's claim against the company. In determining the means of the applicant for legal aid, the National Assistance Board treated the trustee's disposable income and capital as irrelevant and had regard only to the means of the bankrupt, which they assessed as nil. On the basis of that determination, the local aid committee granted a certificate for legal aid to the trustee in bankruptcy.

On an application by the company for an order of certiorari on the ground that the committee had no power to grant a certificate to a trustee in bankruptcy:—

Held, (1) that the determination by the National Assistance Board should have had regard to the means of the trustee in bankruptcy as applicant, the bankrupt's means being irrelevant, and that the incorrect determination did not give the committee jurisdiction to grant the certificate to a trustee in bankruptcy;

(2) that, while the fact that there is no appeal from a decision of a legal aid committee other than by an aggrieved applicant for

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

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legal aid does not itself make the committee amenable to certiorari, the committee nevertheless is a body which is under a duty to act judicially and is therefore subject to an order of certiorari where it has granted a certificate in excess of its jurisdiction;

(3) that the risks inherent in having to litigate against a party who has been granted legal aid under the Act of 1949 made the applicants persons aggrieved and entitled *ex debito justitiae* to an order for certiorari to have the certificate quashed.

MOTION by Messrs. R. A. Brand & Co. Ld. for an order of certiorari to remove and quash a civil aid certificate dated March 22, 1951, entitling Frank Higginson Walsh to legal aid under Part I of the Legal Aid and Advice Act, 1949, in connexion with proceedings in the King's Bench Division continued by him as trustee in bankruptcy of one Leonard Brooks, carrying on business as L. Brooks & Co., against the applicants.

In 1948, Mr. Leonard Brooks, who was carrying on business as a photographic film processor under the name of L. Brooks & Co., agreed to purchase from the applicants a quantity of paper for backing films. On November 17, 1948, the applicants issued a writ claiming the balance of £343 due for paper delivered; and on November 24, Brooks delivered a defence, counterclaiming some £6,000 as damages on the ground that the paper delivered from time to time had proved unfit. The case came on for trial on March 8, 1950, and by consent judgment was given on the claim, and the counterclaim was withdrawn without prejudice to the bringing of a fresh action. The judgment was not satisfied, and on April 11, 1950, a bankruptcy notice was served on Brooks. He then issued a writ, claiming damages in the sum of £9,233 for breach of contract and warranty in connexion with the paper delivered.

On July 31, 1950, the Divisional Court in Bankruptcy stayed proceedings on the bankruptcy notice on the debtor's undertaking to prosecute the action and pay the sum of £300 to a stakeholder by October 3; but this was not done, and on November 22 the debtor was adjudicated bankrupt, and Mr. Frank Higginson Walsh, a chartered accountant, became his trustee in bankruptcy.

The position with regard to the estate was that if the bankrupt's claim against Brands were recovered, that sum, some £9,000, would enure as to £3,340 for the benefit of sundry creditors and as to about £6,000 for the benefit of the bankrupt.

About the time of the bankruptcy, Brooks had applied for legal aid, and on November 24, two days after the adjudication, he was granted a certificate of legal aid. On December 18, this certificate was discharged at his instance, his claim having vested in his trustee in bankruptcy. The latter, having failed to obtain from the creditors an indemnity against costs with a view to pursuing the action against Brands, conceived the idea of seeking to obtain legal aid himself, under the provisions of the Legal Aid and Advice Act, 1949.[1] He completed the approved form of application for a civil aid certificate to take proceedings (Form

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[1] Legal Aid and Advice Act, 1949, s. 1: "(6) A person shall not be "given legal aid in connexion with "any proceedings unless he shows "that he has reasonable grounds for "taking, defending or being a party "thereto, and may also be refused "legal aid if it appears unreasonable "that he should receive it in the "particular circumstances of the "case."

S. 2: "(1) Subject to this Part of "this Act, legal aid shall be available "for any person whose disposable "income does not exceed four hundred "and twenty pounds a year: Pro"vided that a person may be refused "legal aid if he has a disposable "capital of more than five hundred "pounds and it appears that he can "afford to proceed without legal aid. ". . . (2) Where a person receives "legal aid in connexion with any "proceedings— . . . (*e*) his liability "by virtue of an order for costs made "against him with respect to the pro"ceedings shall not exceed the "amount (if any) which is a reason"able one for him to pay having "regard to all the circumstances, "including the means of all the "parties and their conduct in con"nexion with the dispute."

S. 4 (6): "Subject to the provisions "of this section, a person's disposable "income and disposable capital, and "the maximum amount of his contri"bution to the legal aid fund in "respect of any proceedings, shall be "determined by the National Assis"tance Board, and the Board may "call attention to any special circum"stances affecting the maximum "amount of the lump sum and "periodical payments which he could "reasonably make on account of any "contributions."

S. 6: "(3) Where a barrister "or solicitor is aggrieved by any "decision excluding him (whether "permanently or temporarily) from "the panels or any of them, he may "appeal against the decision to the "High Court, and the High Court "(whose decision shall be final) may "confirm or quash the decision "appealed against or may substitute "such decision as the court thinks "fit. Provision shall be made by "rules of court for regulating appeals "to the High Court under this sub"section, and those rules shall pro"vide for limiting the time within "which appeals may be brought."

S. 8: "(1) Subject to this Part of "this Act, it shall be the responsi"bility of the Law Society to make "arrangements, in accordance with a "scheme made by them with the "approval of the Lord Chancellor "and with the concurrence of the "Treasury, for securing that legal "aid and legal advice are available "as required by this Part of this Act "and generally to administer this "Part of this Act. . . . (3) The func"tions of the Law Society under this "Part of this Act may be performed "by the Council of the Law Society "in general consultation with the "General Council of the Bar on "matters of policy or by any commit"tee of the Council of the Law Society "or by any committee set up by a "scheme under this section. . . . "(8) Subject to this Part of this Act, "a scheme under this section may "include provisions as to the persons "by whom and manner in which "questions arising in the administra"tion of this Part of this Act are to "be determined and as to any other "matters incidental to the adminis"tration thereof. (9) The Law Society

A.1) as required by the Act and the Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359),[2] and sent it to the local committee for the Manchester area, one of the areas into which the country was divided under the Legal Aid Scheme, 1950.

Part IV of the form, which had to be sent on by the local committee (appointed by the area committee) to the National

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"shall exercise their functions under this Part of this Act under the general guidance of the Lord Chancellor, and as soon as possible after the end of any financial year shall make an annual report to him on the operation and finance of this Part of this Act during that year."

S. 12: "(3) Regulations may also modify any provision of this Part of this Act so far as appears to the Lord Chancellor necessary to meet the special circumstances where—(*a*) a person seeking or receiving legal aid or advice— . . . (ii) is concerned in a representative, fiduciary or official capacity."

[2] Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 3: "(1) Any person desiring legal aid may apply for a certificate—(*a*) if resident in England or Wales, to any local committee; and (*b*) if resident elsewhere, to the local committee for London. (2) Every application shall be made in writing, on a form approved by the Law Society, or in such other manner, being in writing, as the secretary of the local committee may accept as sufficient in the circumstances of the case and shall be lodged with the secretary of the local committee. (3) Every application shall contain such information and shall be accompanied by such documents as may be requisite to enable—(*a*) a local committee to determine—(i) the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required; and (ii) the question whether it is reasonable that a certificate should be granted; and (*b*) the Board to determine the disposable income and disposable capital of the applicant, for which purpose the applicant shall undertake to furnish the Board with such further information as they may require in the circumstances of the case."

Reg. 4: "(1) Subject to the provisions of regulation 10, an application for a certificate shall not be approved, except after consideration by a local committee of the general circumstances in which it is made, including questions of fact or law arising out of any proceedings to which the application relates, nor, except as is provided by paragraph 3 of regulation 5, shall any application be approved except after determination by the Board of the disposable income and disposable capital of the applicant. . . . (3) Where an application for a certificate is made by a trustee, executor, administrator or other person in circumstances in which, in the opinion of a local committee, a court would order the taxed costs of the proceedings to be paid out of a property, estate or fund, the committee shall not grant the application unless it appears that the property, estate or fund would be so diminished or exhausted by that order as to cause hardship to any person beneficially interested."

Reg. 15: "(2) Whenever an assisted person becomes a party to proceedings, or a party to proceedings becomes an assisted person, his solicitor shall forthwith serve all other parties with notice in Form VI and shall, if at any time thereafter any other person becomes a party to the proceedings, forthwith serve similar notice upon such person."

Assistance Board was headed: "Statement of financial circum-"stances of an applicant for a civil aid certificate." Then followed Mr. Walsh's name and address and his occupation as chartered accountant; the reply to the question: "Have you any "persons dependent upon you?" was "I am trustee in bank-"ruptcy of the estate of Leonard Brooks"; and to further questions as to the persons living with him, the rent he paid, whether he or his wife owned the house, as to his annual income and as to his savings, the answers were the initials "N.A."—"not applicable." Finally, in answer to the question whether there was any additional information affecting his financial circumstances, the reply was: "The only material financial circum-"stances are those of the bankrupt, to whom a civil aid certificate "was granted prior to the adjudication."

The local committee passed on Part IV of the form to the National Assistance Board, which in turn determined the disposable income of the trustee in bankruptcy and his maximum contribution to the legal aid fund as "nil." The local committee considered the application and the Board's determination, and issued a certificate on March 22, 1951, which ran as follows: "This is to certify that Frank Higginson Walsh, hereinafter "called 'the assisted person,' is entitled, in accordance with the "Legal Aid and Advice Act, 1949, and the regulations and "scheme made thereunder, to legal aid as plaintiff in connexion "with the following proceedings," that is, the proceedings against R. A. Brand & Co. Ld. "This is further to certify that "(1) the assisted person's solicitor is Alec Barker, Esq.; (2) the "National Assistance Board have determined the assisted per-"son's disposable income as nil, his disposable capital as nil, and "his maximum contribution as nil; (3) the local committee have "assessed the assisted person's contribution at nil."

On June 16, 1951, notice was given to the applicants' solicitors that a civil aid certificate had been issued to the trustee in bankruptcy in connexion with the claim against the company. They expressed surprise that legal aid had been granted to an accountant whose disposable income was clearly in excess of £420 a year; and brought these proceedings, alleging that in granting the certificate the local committee had exceeded its jurisdiction, and that the applicants were persons aggrieved; and praying that the certificate should be quashed.

Sir Hartley Shawcross Q.C. and *L. Caplan* for the applicants. The questions of law are: (1) did the committee act in excess of its jurisdiction, and (2) does certiorari lie to quash its decision? By section 2 of the Legal Aid and Advice Act, 1949, legal aid is available for a person whose disposable income does not exceed £420 a year; and by section 4 (6) that income is to be determined by the National Assistance Board. The trustee in bankruptcy said his own means were irrelevant, and the Board did not assess his personal income. Thus the first condition precedent to a grant of legal aid, that the applicant's income must not exceed £420, was not satisfied, and the committee therefore exceeded its jurisdiction in granting him a certificate.

Unless certiorari lies to the committee, there is no way in which its activities can be controlled, unlike cases of other similar tribunals to which it has been held that the order is not applicable, where there is some sort of political control over them. The general principle applicable here is that of *Rex* v. *Woodhouse; Ex parte Ryder*,[3] where Vaughan Williams L.J. said that certiorari had issued in cases where it was impossible to say that there was a court or a lis. In *Rex* v. *Boycott; Ex parte Keasley*,[4] Lord Hewart C.J. quoted with approval the words of Atkin L.J. in *Rex* v. *Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ld.*,[5] that "wherever any body of "persons having legal authority to determine questions affecting "the rights of subjects, and having the duty to act judicially, act "in excess of their legal authority, they are subject to the con-"trolling jurisdiction of the King's Bench Division, exercised in "these writs": see also *Reg.* v. *Coles*,[6] *Reg.* v. *White*[7] and *Reg.* v. *Saunders*.[8]

The test is whether the committee has to exercise discretion by reference to extraneous considerations of policy and expediency or whether it is confined to the facts before it within the framework of the law it has to administer, and nothing else. In issuing certificates the committee discharges an administrative function, but in exercising its jurisdiction it cannot consider general policy; for instance, the committee could not refuse a certificate for legal aid in divorce proceedings because the divorce list was overcrowded. The fact that its functions are set out in the Act under the heading "Administration" is irrelevant. If the functions were intended to be purely administrative it is curious to find that the Act and the regulations made under it give such careful guidance in regard, for instance, to the right to appeal by

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[3] [1906] 2 K.B. 501, 512.
[4] [1939] 2 K.B. 651, 659.
[5] [1924] 1 K.B. 171, 205.
[6] (1845) 8 Q.B. 75.
[7] (1883) 11 Q.B.D. 309.
[8] (1854) 3 E. & B. 763.

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section 6 (3) of the Act, and by General Regulation 9; and it would be shocking if a committee consisting entirely of lawyers had not to make its decisions judicially. The determination that has to be made is quasi-judicial within the meaning of the authorities on certiorari. The committee exceeded its jurisdiction and an order of certiorari should issue against it.

Cyril Salmon Q.C. and *J. R. Cumming-Bruce* for the Law Society and the local aid committee. The Act sets up purely administrative tribunals. The essential characteristic of judicial proceedings before a tribunal other than a court is that each side shall have a right to be present and to be heard. Scrutton L.J. in *Rex* v. *The London County Council; Ex parte The Entertainments Protection Association Ld.*,[9] supports that view, where he says[10]: "It is enough if the tribunal is exercising, after hearing "evidence, judicial functions in the sense that it has to decide on "evidence between a proposal and an opposition." There is no provision in the Act or the regulations for anyone other than the applicant for aid to be heard; the information supplied is confidential. If Parliament intended that the tribunal should have quasi-judicial functions, disclosure to the persons against whom it was intended to litigate would be necessary, and they would have to be heard. That would add greatly to the cost and make the whole scheme unworkable. *Reg.* v. *White*[11] is distinguishable. *Boycott's* case[12] was a special case where it may have been thought that a great injustice had been done; but in *Rex* v. *Hendon Rural District Council*[13] Lord Hewart C.J. and Humphreys J. support the view that both sides must be heard. The provisions for appeal do not make the proceedings judicial, for an administrative decision at one level is often reversed at another; and again, only the applicant can appeal.

[PARKER J. In *Rex* v. *Postmaster-General; Ex parte Carmichael*,[14] there was a right of appeal, but no right to oppose. The boy went to the surgeon ex parte; but it was held that the surgeon's certificate was in the nature of a judicial act and certiorari applied.]

The arguments are not reported and the court's attention does not seem to have been drawn to the authorities.

As to whether the committee exceeded its jurisdiction: it is bound by the Board's determination as to the applicant's means, even if the Board have made a mistake. The Board thought they could ignore the trustee's means and consider only those of the bankrupt. It is important to know from this court whose means should be looked at.

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[9] [1931] 2 K.B. 215.

[10] Ibid. 233.

[11] 11 Q.B.D. 309.

[12] [1939] 2 K.B. 651.

[13] [1933] 2 K.B. 696, 701, 705.

[14] [1928] 1 K.B. 291.

[LORD GODDARD C.J. The Act is to help poor persons to take proceedings; the use of public funds to enable trustees in bankruptcy to bring actions for the benefit of creditors, who may be very wealthy concerns, seems quite foreign to its intention; but that will be the position if this court cannot intervene.]

But the bankrupt parts with his cause of action. He should never have been made bankrupt; and that view influenced the Board, even if a mistake has been made.

[PARKER J. No one questions the bona fides of the Board; but do they now recognize that they acted in error?]

[*J. P. Ashworth* for the National Assistance Board. Yes, and they are prepared to revise their instructions.]

This particular kind of case can be put right by new regulations, but the more important general question remains, because of the far-reaching results which will follow if the committee is held to be quasi-judicial.

[PARKER J. Could it not be argued that there is a duty to act judicially in the course of reaching a final decision which is itself purely administrative? There are cases, e.g., *Errington* v. *Minister of Health*,[15] where certiorari has been laid to a Minister on the ground that he has exceeded his jurisdiction in making an administrative decision.]

That case illustrates my point, and Maugham L.J.[16] and Roche L.J.[17] support me.

As to whether the applicants are aggrieved, the only harm if they win the action is that they might recover solicitor and client costs from the public. Prima facie there was a meritorious case against them which the creditors were not prepared to finance in the usual way; but for the legal aid certificate the action might not have been brought against them. Can they be said to be aggrieved because a person of substance standing in the shoes of the poor person is able to bring the action?

Neil Lawson for the trustee in bankruptcy. Part I, section 12 (3) of the Act contemplates actions by persons in a representative capacity, and regulation 4 (3) of the General Regulations shows that the Board does not have regard to the personal means of such persons. This appears more fully in the Assessment

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[15] [1935] 1 K.B. 249.

[16] Ibid. 271.

[17] Ibid. 280.

Regulations: see regulation 5 (1),[18] dealing with infants, which is relied on. The trustee took that view of the Act and the regulations, and the means determined were those of the true plaintiff.

[LORD GODDARD C.J. But who is the true plaintiff? Here you are concerned, not merely with the bankrupt, but with the creditors, who may be banks, insurance companies and the like. Provision ought to be made in the regulations, but it is not there now.]

It is conceded that this particular case could not be put right by the Board's making a new determination, for that does not involve the automatic revocation of the certificate under the General Regulations. If the committee has issued a certificate which it had no power to issue, the applicants could have applied for a stay of proceedings under the inherent jurisdiction of the court.

Sir Hartley Shawcross Q.C. in reply. There is no power under the Act or the regulations to revoke the original certificate or the certificate under which this motion has been argued, unless the applicant made a false statement. Regulation 11 of the Assessment Regulations provides for an alteration by the Board, but it does not put an end to the certificate. It is difficult to see how a certificate wrongly issued can be quashed if certiorari does not lie. If the committee made a mistake, not merely as to financial means, but much more serious, e.g., as to law, there is no means of quashing it unless the court will do so.

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[18] Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950, No. 1358), reg. 5: "(1) Where "an application for a certificate is "made by or on behalf of an infant, "there may, in addition to the "resources of the infant, be taken "into account . . . the disposable "income and disposable capital of "such other person or persons, being "one or more of the following persons "as the Board having regard to all "the circumstances including the age "and resources of the infant may "decide. . . ."

Reg. 9: "(2) Subject to the pro"visions of the next two succeeding "regulations every decision or deter"mination of the Board shall be "final."

Reg. 11: "Where it appears to the "Board that there has been some "error or mistake in the determina"tion of a person's disposable income, "disposable capital or maximum con"tribution or in any computation or "estimate upon which such deter"mination is based and that it would "be just and equitable to correct the "determination, the Board may, with "the consent of the committee by "whom the certificate would be "issued, discharged or revoked, "correct such error or mistake and "make an amended determination, "and such amended determination "shall for all purposes be substituted "for the original determination and "shall have effect in all respects as "if it were the original determina"tion."

By the First Schedule, Part I, para. 9: "Where there are any "special circumstances the amount "of income calculated in accordance "with this Part of this Schedule may "be adjusted as may be appropriate "to those circumstances."

By the Second Schedule, Part I, para. 16: "Where there are special "circumstances the amount computed "in accordance with this Part of this "Schedule may be adjusted as is "appropriate to meet those circum"stances."

The proposition that no proceedings are judicial unless both sides can be heard is contrary to principle. Scrutton L.J. in the *L.C.C.* case [19] said only: "It is *enough*" if you have something in the nature of a lis. But in *Carmichael's* case [20] and *Boycott's* case [21] there was something less than a lis. *Boycott's* case [21] is not the highwater mark but part of a line of clear authority. In *Reg.* v. *Coles* [22] there was no lis, but the body concerned had to decide judicially whether a particular subject was entitled to something. In *Reg.* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*,[23] there was no lis, but those who decided had to apply a legal mind.

The applicants are aggrieved not merely because they are exposed to an action which might not otherwise have been brought, but mainly because they must run the risk of being less able to recover costs if they win, for two reasons: (1) There is an added discretion in the court under section 2 (2) (*e*) of the Act interposed between them and their right to costs which would not arise at all if the plaintiff were not assisted. Thus before a judge orders costs to be paid by the plaintiff, he must inquire into my clients' means; he might even order that the plaintiff need only pay his own costs.

[LORD GODDARD C.J. The judge may cross-examine as to means?]

Not only as to means but also as to circumstances and conduct in relation to the action. That would not arise in the ordinary action. (2) The Board in computing the disposable means of the applicant for legal aid can disregard his main assets, such as house, furniture, tools of trade; and the court cannot have regard to those assets to a greater extent than the Board can do. An assisted person may have a small income but a valuable house and furniture, against which a successful defendant might proceed if he got an order for costs; but not so in the case of an assisted litigant if the Board had decided to disregard those items. The applicants are thus persons aggrieved, and the committee having judicial functions to perform, certiorari should lie.

Cur. adv. vult.

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[19] [1931] 2 K.B. 215.

[20] [1928] 1 K.B. 291.

[21] [1939] 2 K.B. 651.

[22] 8 Q.B. 75.

[23] [1952] 1 K.B. 338.

Feb. 14. PARKER J., reading the judgment of the court, set out the relevant section of the Act and the regulations made under it, stated the facts, and continued:—The first question which arises is whether the local committee exceeded their jurisdiction. Prima facie they did, since it is, under regulation 4 (1) of the General Regulations, a condition precedent to the grant of a certificate that there shall have been a "determination by the "Board of the disposable income and disposable capital of the "applicant," and it is conceded that the Board have not made any such determination in regard to the applicant's disposable income or capital but have made a determination in regard to Leonard Brooks' disposable income and capital. It was faintly argued that the Board were entitled to do this by reason of paragraph 9 of Sch. I and paragraph 16 of Sch. II to the Legal Aid (Assessment of Resources) Regulations, 1950, which enable the Board in special circumstances to adjust the amount of income or capital calculated in accordance with the schedule in such way as may be appropriate in those circumstances. In our view, however, those paragraphs cannot enable the Board in effect to substitute the bankrupt's income and capital for that of the applicant. It was further faintly argued that by reason of regulation 4 (3) of the General Regulations there was in the case of a trustee in bankruptcy no limitation of income above which legal aid could not be granted.

[His Lordship read regulation 4 (3) and continued:] It seems to us, however, clear that this provision is not in substitution of an income limit but is, in the case of a trustee, executor, or administrator, a further condition precedent to the granting of a certificate.

Nor can it be validly contended that since the determination of the Board, except in certain events, is final (see regulation 9 (2) of the Assessment Regulations) the local committee were in this case acting within their jurisdiction in granting the certificate. In fact, there has been no valid determination by the Board, and the local committee have been privy to the invalidity in themselves passing on Part IV of the application to the Board.

The truth of the matter is that at the moment there are no specific provisions dealing with the position of a trustee in bankruptcy in relation to the income test. That a special provision could be made is clear from section 12 (3) of the Act. [His Lordship read the subsection, and continued:] It may be, though this is not a matter for this court, that some special provisions should be made, but at the moment there are none.

It follows, therefore, that in the present case the local committee, acting perfectly bona fide and in an attempt to do what seemed right in the peculiar circumstances of this case, have exceeded their jurisdiction.

The next, and perhaps the most important question, is whether the local committee is a body against whom the remedy by way of certiorari will lie. It has been urged upon us that if it does not, here is a body, who in effect now recognize their mistake, who cannot be controlled by anyone. There is no appeal from them except by an applicant who has been refused a certificate. Further, though regulation 11 of the Assessment Regulations enables the Board, with the consent of the committee, to correct a determination by making an amended one, it is by no means clear that any committee can discharge or revoke the existing certificate. Regulation 11 of the General Regulations enables an area committee to discharge a certificate, but only in the circumstances there set out, none of which would seem applicable in the present case.

While appreciating the force of this contention it does not seem to us that it is a matter which we ought to take into consideration in determining whether certiorari lies against the local committee. Either the remedy is available or it is not, regardless of the odd result which might follow in the latter event. The fact that there is no appeal, other than by an aggrieved applicant, does not of itself make the committee amenable to certiorari.

In considering this question it is sufficient, at any rate in the present case, to start with the statement of the principle by Atkin L.J. in *Rex* v. *Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ld.*[24]: "The question "now arises whether the persons interested are entitled to the "remedy which they now claim in order to put a stop to the "unauthorized proceedings of the Commissioners. The matter "comes before us upon rules for writs of prohibition and certiorari "which have been discharged by the Divisional Court. Both "writs are of great antiquity, forming part of the process by "which the King's courts restrain courts of inferior jurisdiction "from exceeding their powers. Prohibition restrains the tribunal "from proceeding further in excess of jurisdiction; certiorari "requires the record or the order of the court to be sent up to "the King's Bench Division, to have its legality inquired into,

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[24] [1924] 1 K.B. 171, 204–5.

"and, if necessary, to have the order quashed. It is to be noted "that both writs deal with questions of excessive jurisdiction "and doubtless in their origin dealt almost exclusively with the "jurisdiction of what is described in ordinary parlance as a Court "of Justice. But the operation of the writs has extended to "control the proceedings of bodies which do not claim to be, "and would not be recognized as, Courts of Justice. Wherever "any body of persons having legal authority to determine "questions affecting the rights of subjects, and having the duty "to act judicially, act in excess of their legal authority they are "subject to the controlling jurisdiction of the King's Bench "Division exercised in these writs."

Whether or not Lord Atkin was there laying down an exhaustive definition of the bodies against whom certiorari lies it is unnecessary for us to determine, and for the purposes of this judgment it is sufficient to assume that the definition is exhaustive.

That the local committee was a body of persons having legal authority to determine questions affecting the rights of subjects was admitted and, indeed, is clear. The real contest in the present case is whether they also had the duty to act judicially. It was contended on behalf of the committee that there is no duty to act judicially unless the proceedings are judicial or quasi-judicial proceedings in the sense that there is some form of lis and there is a duty to hear both sides. This argument is supported by reference to *Rex* v. *The London County Council; Ex parte The Entertainments Protection Association Ld.*,[25] where Scrutton L.J. said: "An argument has been addressed to us, supported "by a number of dicta in cases where the question was not "raised, that this procedure of the Theatres Committee was not "in any way a judicial act, but was an administrative act, and "that if, in administration, they were doing a thing which they "had no power to do, the writ of certiorari was not the proper "means of questioning that action of theirs, though it was a "usurped jurisdiction. Now in the early days of licensing there "have been authorities bearing one way and the other, on the "question whether the action of licensing justices is a judicial "act, so that certiorari may lie, or is an administrative act, so "that certiorari will not lie. The writ of certiorari is a very old "and high prerogative writ drawn up for the purpose of enabling "the Court of King's Bench to control the action of inferior

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[25] [1931] 2 K.B. 215, 233–4.

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" courts and to make it certain that they shall not exceed their " jurisdiction; and therefore the writ of certiorari is intended to " bring into the High Court the decision of the inferior tribunal, " in order that the High Court may be certified whether the " decision is within the jurisdiction of the inferior court. There " has been a great deal of discussion and a large number of cases " extending the meaning of 'court.' It is not necessary that " it should be a court in the sense in which this court is a court; " it is enough if it is exercising, after hearing evidence, judicial " functions in the sense that it has to decide on evidence between " a proposal and an opposition; and it is not necessary to be " strictly a court; if it is a tribunal which has to decide rights " after hearing evidence and opposition, it is amenable to the " writ of certiorari; and I do not discuss further the nature of " the writ, because very elaborate discussions of it will be found " in the recent cases of *Rex* v. *Electricity Commissioners; Ex* " *parte London Electricity Joint Committee Co. (1920) Ld.*[26] and " *Rex* v. *Minister of Health; Ex parte Davis.*[27] As far as the " licensing is concerned, whatever doubts there were in the early " stages of the proceedings—and there were many doubts—since " the case of *Rex* v. *Woodhouse; Ex parte Ryder*,[28] it is quite " clear that every proceeding of magistrates or confirming " authorities in granting new or renewing old licences is in the " nature of a court, excess of jurisdiction in which can be dealt " with by the writ of certiorari; and the procedures in granting " licences under the Cinematograph Act, and proceedings consequential thereon, appear to me to stand exactly on the same " footing as the proceedings of magistrates or confirming " authorities dealing with the licences for public houses."

Reference was also made to *Errington* v. *Minister of Health*,[29] where Maugham L.J. said: " In determining whether " the position of the Minister is that which I have described as " being quasi-judicial, I think it is necessary to appreciate that " under a clearance area scheme to which objections are made " by the owners of the property in the area, there is a true " contest as between the owners of the property and the local " authority; in other words, there are two sides as between " whom the Minister has to come to a determination after consideration. It also has to be borne in mind that the rights of " the householders are being very seriously affected by an order " that their houses shall be demolished without compensation.

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[26] [1924] 1 K.B. 171.

[27] [1929] 1 K.B. 619.

[28] [1906] 2 K.B. 501.

[29] [1935] 1 K.B. 249, 271.

"That, of course, must not be pressed too far, but it is a con-"sideration which cannot be neglected."

Again, Roche L.J. said [30]: "It is sufficient to say that whereas "it is sometimes contended that the principles of natural justice "are vague and difficult to ascertain, fortunately the principles of "British justice have been authoritatively laid down; and they "at all events extend to the assertion of this principle, that "where judicial functions, or quasi-judicial functions, have to "be exercised by a court or by a board, or any body of persons, "it is necessary and essential, in the words of Lord Loreburn "L.C. in *Board of Education* v. *Rice*,[31] which have already been "cited, that they must always give a fair opportunity to those "who are parties in the controversy to correct or to contradict "any relevant statement prejudicial to their view. In other "words, those principles of British justice proceed upon the "basis that both sides have a right to be heard."

The test contended for on behalf of the committee would, however, appear to be in conflict with a long line of cases. Thus, in *Reg.* v. *Saunders*,[32] orders of sessions allowing certain expenses were quashed. Crompton J. said [33]: "Passing accounts "is a judicial act; those who do so ought to examine, and allow "or disallow according to law; and, this being a judicial act, and "the certiorari not being taken away, we are bound, if it appears "that an illegal item has been passed, to grant a certiorari and "to quash the illegal allowance."

Again, in *Rex* v. *Woodhouse; Ex parte Ryder*,[34] it was held that certiorari would lie to bring up and quash an order made by licensing justices. Vaughan Williams L.J. said [35]: "I ask "myself, therefore, the question whether the licensing justices "in granting or refusing a licence do a judicial act. In my "opinion the grant or refusal of such a licence is a judicial act, "and the judgment of Lord Halsbury in *Sharp* v. *Wakefield* [36] "seems to be an authority for this view; for he says . . . that 'an "'extensive power is confided to the justices in their capacity "'as justices to be exercised judicially, and discretion means, "'when it is said that something is to be done within the discre-"'tion of the authorities, that that something has to be done "'according to the rules of reason and justice, not according to "'private opinion, according to law, and not humour; it is to

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[30] [1935] 1 K.B. 249, 280.

[31] [1911] A.C. 179, 182.

[32] 3 E. & B. 763.

[33] Ibid. 778.

[34] [1906] 2 K.B. 501.

[35] Ibid. 512–3.

[36] [1891] A.C. 173, 179.

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" 'be, not arbitrary, vague, and fanciful, but legal and regular.' "This view seems to me to be confirmed by old and recent "decisions. It is impossible to read under the title 'Certiorari' "in Burn's Justice of the Peace the list of the cases in which a "writ of certiorari has been granted and the grounds for granting "it without seeing that in practice a certiorari has issued in "cases in which it is impossible to say that there was a court "and a lis."

In *Rex* v. *Postmaster-General; Ex parte Carmichael*[37] the certificate of the chief medical officer of the Post Office certifying that Carmichael, a clerk, was not suffering from telegraphist's cramp was quashed. Under the Workmen's Compensation Act, 1925, it was a condition precedent to a clerk obtaining workmen's compensation for telegraphist's cramp that he should obtain the certificate of the certifying surgeon that he was suffering from that condition. It was held that the chief medical officer of the Post Office had not been validly substituted for the certifying surgeon. All the members of the court were clear that such a certificate was a fit subject for certiorari, though it is only right to say that the matter does not appear to have been fully argued. Lord Hewart C.J. said[38]: "There was "a moment in this case when it was argued that the document "was of such a kind as not to be proper for the writ of certiorari. "But I am satisfied, when I look at the part which a certificate "of this nature must play in the making of any claim for compensation by a Post Office worker suffering from telegraphist's "cramp, that the certificate of the certifying surgeon is of the "nature of a judicial act, and is a fit subject for certiorari."

Finally, in *Rex* v. *Boycott; Ex parte Keasley*,[39] a decision of the Board of Education under the Mental Deficiency Act, 1913, as to whether a boy was or was not capable of receiving benefit from instruction was quashed.

Reference may also be made to *Reg.* v. *Coles*[40] and *Reg.* v. *White*.[41]

In none of these cases, except possibly *Rex* v. *Woodhouse; Ex parte Ryder*,[42] could it be said that the body in question had before it any form of lis or any duty to hear two sides, and we do not accept that test.

The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a court, then, unless, as in the case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry. That, as it seems to us, is the true basis of the decision in *Errington* v. *Minister of Health.*[43] While the Minister's decision to confirm the clearance order was an administrative act for the purpose of which he was entitled and bound to take into consideration questions of policy, yet, before arriving at the decision, he had to consider the objections of the property owners and the views of the local authority. In other words, at one stage of the proceedings leading up to his decision there was something in the nature of a lis before him, and at that stage there was a duty to act judicially, as, for instance, not to hear one side behind the back of the other. Again, in *Rex* v. *The London County Council; Ex parte The Entertainments Protection Association Ld.*,[44] all that it seems to us that Scrutton L.J. was saying was that in the case of the London County Council it was *enough* to make them amenable to certiorari that they had to decide on evidence between a proposal and an opposition during which they had a duty to act judicially.

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[37] [1928] 1 K.B. 291.

[38] Ibid. 296–7.

[39] [1939] 2 K.B. 651.

[40] 8 Q.B. 75.

[41] 11 Q.B.D. 309.

[42] [1906] 2 K.B. 501.

Further, an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law. As Lord Loreburn L.C. said in *Board of Education* v. *Rice*[45]: "Comparatively recent "statutes have extended, if they have not originated, the practice "of imposing upon departments or officers of State the duty of "deciding or determining questions of various kinds. In the "present instance, as in many others, what comes for determina"tion is sometimes a matter to be settled by discretion, involving "no law. It will, I suppose, usually be of an administrative "kind; but sometimes it will involve matter of law as well as "matter of fact, or even depend upon matter of law alone. In

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[43] [1935] 1 K.B. 249.

[44] [1931] 2 K.B. 215, 233–4.

[45] [1911] A.C. 179, 182.

"such cases the Board of Education will have to ascertain the "law and also to ascertain the facts. I need not add that in "doing either they must act in good faith and fairly listen to "both sides, for that is a duty lying upon everyone who decides "anything. But I do not think they are bound to treat such a "question as though it were a trial. They have no power to "administer an oath, and need not examine witnesses. They "can obtain information in any way they think best, always "giving a fair opportunity to those who are parties in the contro-"versy for correcting or contradicting any relevant statement "prejudicial to their view."

Again, in *Local Government Board* v. *Arlidge* Viscount Haldane L.C. said [46]: "My Lords, when the duty of deciding "an appeal is imposed, those whose duty it is to decide it must "act judicially. They must deal with the question referred to "them without bias, and they must give to each of the parties "the opportunity of adequately presenting the case made. The "decision must be come to in the spirit and with the sense of "responsibility of a tribunal whose duty it is to mete out justice. "But it does not follow that the procedure of every such tribunal "must be the same. In the case of a court of law tradition in "this country has prescribed certain principles to which in the "main the procedure must conform. But what that procedure "is to be in detail must depend on the nature of the tribunal. "In modern times it has become increasingly common for "Parliament to give an appeal in matters which really pertain "to administration, rather than to the exercise of the judicial "functions of an ordinary court, to authorities whose functions "are administrative and not in the ordinary sense judicial. "Such a body as the Local Government Board has the duty of "enforcing obligations on the individual which are imposed in "the interests of the community. Its character is that of an "organization with executive functions. In this it resembles "other great departments of the State. When, therefore, "Parliament entrusts it with judicial duties, Parliament must "be taken, in the absence of any declaration to the contrary, to "have intended it to follow the procedure which is its own, and "is necessary if it is to be capable of doing its work efficiently."

More recently it has been held by this court on many occasions that certiorari will lie to quash the decision of rent control tribunals, and this notwithstanding that such a tribunal is entitled to act on its own knowledge and information, without evidence unless submitted, and without a hearing except on notice from a party: see *Rex* v. *Brighton and Area Rent Tribunal.*[47]

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[46] [1915] A.C. 120, 132.

If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially: compare *Franklin* v. *Minister of Town and Country Planning.*[48]

The present case, as it seems to us, is an a fortiori case. Though the local committees may be said to be administrative bodies in the sense that they are responsible for administering the Act, they are quite unconcerned with questions of policy. They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially, not judiciously. It seems to us that the present case is closely akin to the cases of *Rex* v. *Postmaster-General; Ex parte Carmichael*[49] and *Rex* v. *Boycott; Ex parte Keasley.*[50] The certifying surgeon in the former case and the Board of Education certifying medical officer in the latter case were concerned solely with the facts of the particular case, facts presented to them ex parte, and it was not for them to take into consideration any questions of policy or expediency.

The last question which arises is whether the applicants are persons aggrieved. If so, certiorari will be granted ex debito justitiae. In *Rex* v. *Richmond Confirming Authority; Ex parte Howitt*[51] Lord Reading C.J. quoted with approval *Reg.* v. *Nicholson*, where A. L. Smith L.J. said[52]: "But, assuming "certiorari to be the fitting remedy, as a matter of discretion "the certiorari ought not to go. First, on the ground of delay ". . . and, second, on the fact that the applicants have not "shown, as it appears by *Reg.* v. *Surrey Justices*[53] they should "have shown, that they have a peculiar grievance of their own "beyond some inconvenience suffered by them in common with

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[47] [1950] 2 K.B. 410.
[48] [1948] A.C. 87, 102.
[49] [1928] 1 K.B. 291.
[50] [1939] 2 K.B. 651.
[51] [1921] 1 K.B. 248, 255.
[52] [1899] 2 Q.B. 455, 470.
[53] (1870) L.R. 5 Q.B. 466.

"the rest of the public; . . ." Lord Reading C.J. then continued: "I believe that to be the true principle upon which this "court acts. Here the applicant had an interest distinct from "the general inconvenience which may be suffered by the law "being wrongly administered." That was a case of licensing justices having issued a licence without jurisdiction and in spite of an objection made by the applicants for certiorari, who were rival traders; but the principle is clearly laid down.

In the present case the applicants seem to us to be persons aggrieved within this principle. They are persons who incur the risks inherent in having to fight a party who has legal aid. Indeed, the legislation contemplates that they are persons interested, in that regulation 15 (2) of the General Regulations provides that when a party to proceedings becomes an assisted person his solicitor shall forthwith serve all other parties with a notice in Form VI in the Schedule to those Regulations. It is true that if the action was fought to judgment and the applicants succeeded, they might, before the trial judge, prove the matters proved before us, and persuade him that the certificate should be treated as a nullity, as was done by the Court of Appeal in *Greenwood* v. *Sketcher*[54]; but it seems to us that they should not be forced to take this course.

Order of certiorari granted.
Civil aid certificate quashed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Hempsons; Solicitors, Ministry of National Insurance; Jaques & Co., for Barker & Midgley, Blackpool.*

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[54] [1951] 1 T.L.R. 638.

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May 8, 9.

Somervell,
Jenkins and
Morris L.JJ.

MIDGLEY ESTATES LD. *v.* HAND.

[Plaint No. G.O. 3951.]

Principal and Agent—Estate agent—Commission—Sale of business and property—Agreement by principal to pay commission "as soon as "purchaser shall have signed a legally binding contract effected "within a period of three months"—Purchaser unable to complete purchase—Deposit forfeited—Commission payable.

By a contract entered into between the plaintiffs, estate agents, and the defendant vendor it was agreed that the agents' commission should be paid as soon as the purchaser introduced by them "shall "have signed a legally binding contract, effected within a period "of three months from this date." The person introduced signed a legally binding contract within the three months, paid a deposit, and was permitted by the vendor to enter into occupation of the premises, but he was unable financially to complete the purchase and his deposit was forfeited.

The agents claimed their commission, but the county court judge held that the person they had introduced not being able to complete the purchase they had not earned their commission. On appeal:—

Held, that although, generally speaking, when a vendor puts his property into the hands of an agent for sale he contemplates that if a completed sale resulted, and not otherwise, he will be liable to pay the agent's commission out of the purchase price, the question depends on the construction of each particular contract. If its terms are clear, and not ambiguous, the court will give effect to them. The plaintiff agents having introduced, within the stipulated period of time, a person who had bound himself to purchase the property by a legally binding contract they had earned their commission, and the subsequent fate of the contract of sale did not affect their right to it.

APPEAL from Judge Harold Brown, sitting at Liverpool County Court.

On June 20, 1950, the defendant, Hand, the owner of a property known as the Railway Supper Bar at Rock Ferry, Cheshire, instructed the plaintiff estate agents, by letter, to dispose of the business and premises, as soon as possible. The price was stated to be "£1,800 with stock, fixtures and fittings at "valuation." The letter concluded: "N.B. Fully 66 per cent. "of the price asked can be arranged on mortgage if so desired." The plaintiffs acknowledged the instructions and it was agreed between the parties, by a letter dated June 23, 1950, that commission at the rate of 5 per cent. was to be paid to the agents as soon as "our purchaser shall have signed a legally binding con-"tract, effected within a period of three months from this date."

The plaintiff succeeded in introducing a person who on July 6 signed a binding contract to purchase the property for £1,800. That contract was superseded by another more formal document dated October 2, 1950, by which the proposed purchaser agreed to purchase for £1,900. In neither document was any stipulation made as to any part of the purchase price being provided by means of a mortgage. The proposed purchaser paid a deposit of £380, and he was let into possession of the property. He was, however, unable to find the whole of the purchase money, and the vendor being unable or unwilling to grant a mortgage, the

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sale was never completed. The defendant brought proceedings against the proposed purchaser and recovered possession of the property and was held to be entitled to forfeit the deposit.

The plaintiff agents, by the present action, claimed to recover from the defendant the amount of their commission, namely £95.

The county court judge, holding himself bound by previous decisions of the Court of Appeal and the House of Lords, found for the defendant on the ground that the person introduced being financially unable to complete the purchase the plaintiffs had not earned their commission. The plaintiffs appealed.

Andrew Rankin for the plaintiffs. It is almitted that the plaintiffs introduced a purchaser who signed and exchanged legally binding contracts, and it is submitted that they are entitled to their commission. The judge held, however, that as the purchaser was not able to purchase, although he had signed a binding contract to do so, the agents had not introduced an able purchaser and had not earned their commission. The judge has taken out of the agreement the word "purchaser" and has construed it without considering the following words, "shall have signed a "legally binding contract." It is clear that here the word "purchaser" is used in its secondary sense and not in its primary sense. The judge based his decision on *Poole* v. *Clarke & Co.*,[1] but that case is clearly distinguishable, because there the judge was concerned only with the meaning of the words "find a pur-"chaser." It is the event which decides that the estate agent is entitled to his commission. [*James* v. *Smith*[2]; *Luxor* (*Eastbourne*) *Ld.* v. *Cooper*[3]; *Bennett* v. *Millett*,[4] also were referred to.]

Gerson Newman for the defendant. The plaintiff has not earned his commission. To do so he must prove that he has introduced a person able and willing to complete the contract which he has entered into. The judge has found that right from the start the person introduced was unable to complete the purchase. The decision of Singleton J. in *Poole* v. *Clarke & Co.*[5] is on all fours with the present case.

Rankin in reply. The person introduced was not a man of straw, and if the vendor had carried out his own instructions to the agents with regard to granting a mortgage the purchase would have been completed. In a sense the failure to complete was due to the vendor's fault.

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[1] [1945] 2 All E.R. 445.

[2] [1931] 2 K.B. 317 n.

[3] [1941] A.C. 108.

[4] [1949] 1 K.B. 362.

[5] [1945] 2 All E.R. 445.

SOMERVELL L.J. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. stated the facts and continued:—Contracts of agency between owners of property and estate agents have been many times before these courts. The county court judge was referred, as we have been referred, to a large number of authorities, including, in particular, the well-known case in the House of Lords of *Luxor (Eastbourne) Ld.* v. *Cooper*[6] and *James* v. *Smith.*[7] I hope that I shall not be thought disrespectful to the careful judgment of the judge, or to the very full argument which has been presented to us, if I refrain from referring to those numerous authorities in detail. As pointed out over and over again in the reported cases, an agency contract of this sort, just like any other contract, must be construed according to its terms. One has to look at the particular contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable.

So far as any general principle is deducible from the authorities, their effect may, I think, be thus summarized: The question depends on the construction of each particular contract, but prima facie the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale and, generally speaking, contemplates that if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price. That is, broadly speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of the agent "finding a purchaser," or in the event of the agent "selling the property," have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing to purchase the property. That is

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[6] [1941] A.C. 108.

[7] [1931] 2 K.B. 317 n.

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the broad general principle in the light of which the question of construction should be approached; but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms, even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive.

Returning to the letter in the present case of June 23, it thanks the defendant for his written instructions to sell and then says: " The following conditions of sale are taken as agreed upon " by both parties," and the vital sentence is this: " Commission " at the rate of 5 per cent. to be paid to the company as soon " as our purchaser shall have signed a legally binding contract " effected within a period of three months from this date." It seems to me that those words say, in reasonably plain terms, that the agent's function is to introduce a person who agrees to purchase the property, and furthermore binds himself to purchase it by a legally binding contract. If the agents succeed in producing that result within the stipulated period of three months, then the event has happened upon the happening of which their commission is to be payable. They have earned the commission and the subsequent fate of the contract of sale does not affect their right to it. That seems to me to be the natural and reasonably clearly expressed meaning of this contract according to the language used. It should, therefore, in my view, be given that effect, and the judge, who, as I understand his judgment, was inclined to take a view similar to mine on the construction of the letter of June 23, erred in holding himself bound by authority to take a different view and to conclude that in view of the introduced person's inability to carry out the contract the commission was not earned.

I have said that I did not propose to refer in detail to the authorities, but I should perhaps mention the case of *Poole* v. *Clarke & Co.*,[8] because strong reliance was placed upon it by Mr. Newman for the defendant. The contract which Singleton J. had to construe in that case was in very peculiar and, to my mind, ambiguous terms. It is set out in the report[9] and reads: " I hereby instruct you to find a purchaser for my business, the " particulars of which are to the best of my knowledge and belief " correctly stated as above. I also instruct you to receive any " deposit paid by such purchaser and to apply same on the signing

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[8] [1945] 2 All E.R. 445.

[9] Ibid. 448.

"of the contract, as far as possible, towards payment of your "expenses and commission as agreed hereunder. . . . Amount "of commission and expenses: (a) Commission of 10 per cent. on "the total purchase price (minimum 25 guineas) and expenses." Then there was added: "The vendor agrees to pay any out-of-"pocket expenses up to and not exceeding £10 10s. 0d."

Strong reliance was placed by counsel for the agent on the fact that the agent was authorized to receive any deposit paid by the purchaser and to apply the same towards payment of the agent's commission. The argument was to the effect that this provision showed that the commission was to be considered as earned so soon as a contract was signed and a deposit was paid. The judge rejected that contention. He held that the commission was not earned until the agent had carried out the vendor's request to him to find a purchaser. Inasmuch as the expression "find a purchaser" had been construed in the authorities as meaning a purchaser able and willing to purchase, the judge held that the commission had not been earned and consequently that the provisions for applying the deposit in payment of it could not have the effect contended for. It seems to me that the language of the contract in that case was so very different from the language in the present case that it is really of no assistance as regards the contract we have here to construe. The contract here suggests no independent obligation upon the agent to "find a "purchaser." The payment of the commission is made to depend simply upon the signing of a binding contract. The circumstance that the person who is to sign is described by the plaintiffs as "our purchaser" cannot, in my view, affect the result. As already indicated, I think it is reasonably plain that "purchaser" in the context of this letter means no more than a person who agrees to purchase the property and enters into a legally binding contract so to do.

For these reasons it seems to me that, on the true construction of this particular contract, the agents did in the events which happened earn their commission, and accordingly in my view this appeal should succeed. I should add that, as pointed out by Mr. Rankin for the plaintiffs, this cannot by any means be said to be a case where the owner of property has found himself exposed to a claim for commission on the strength of a contract of sale negotiated by his agents with a mere man of straw. It seems to me on the evidence that, though the contrary ultimately proved to be the case, there was good reason for supposing that the person introduced would, in the event of his entering into a

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binding contract, as he did, be in fact able to carry it through. He paid a deposit of £380 and came near to raising the balance of the purchase-money. As I have already mentioned, his inability to do so seems to have been, in part at all events, due to the fact that in the end the defendant was not disposed to advance on mortgage any substantial proportion of the price. I would therefore allow this appeal.

Somervell L.J. I agree with the judgment which has just been delivered and with the reasons which my brother has given for the conclusion at which he arrives. I only want to add one observation to it, and that relates to a paragraph in the judge's judgment in which he sets out the argument of Mr. Rankin to this effect: "In the course of that argument, Mr. Rankin was "constrained to put his case as high as this, namely, that even "had a man of straw been introduced and had signed a legally "binding contract, the plaintiffs would, in the absence of fraud, "have been entitled to commission." It is unnecessary to consider whether in addition to fraud some question of negligence might in certain circumstances arise. All I wish to point out is this, that under a contract of the kind which we are construing the commission is not earned until there is the signing of a legally binding document, and there would be ample opportunity, one would think, for the vendor himself to make such inquiries as he thought necessary to satisfy himself as to the ability of the person to perform the contract which was to be put before him for signature. If the vendor was not satisfied with those inquiries he was, of course, under no obligation to accept the person whom the estate agents had introduced as a possible purchaser. For these reasons I think the appeal should be allowed.

Morris L.J. I agree. The case depends upon the construction of the particular words used in the letter of June 23 as those words are found in their context. In my judgment, by accepting those words, the vendor in this particular case agreed to pay commission as soon as the agent's purchaser should have signed a legally binding contract, providing that that took place within three months from June 23. In my judgment, the words mean that the agents will have earned their commission and, therefore, are entitled to be paid it, as soon as a person introduced by the agent enters, in the capacity of a purchaser, into a legally binding contract with the vendor within the time specified. As my Lord has said, it is to be observed that no allegations of bad faith or imputations of negligence are in any way made. In my judgment, the admitted facts show that the commission had been earned.

Appeal allowed.

Solicitors: *Cardew-Smith & Ross, for Geoffrey Warhurst & Co., Liverpool; Field, Roscoe & Co., for Berkson & Berkson, Birkenhead.*

A. W. G.

EAST INDIA TRADING CO. INC. *v.* CARMEL EXPORTERS AND IMPORTERS LD.

1952
March 27;
April 8.

Sellers J.

Foreign judgment—Damages for breach of contract—Action to enforce—Award to be converted into sterling at rate of exchange at date of foreign judgment.

Where an action is brought in England to enforce a foreign judgment awarding damages for breach of contract, the relevant date for the award to be converted into sterling is the date of the foreign judgment.

Madeleine Vionnet et Cie. v. *Wills* [1940] 1 K.B. 72 applied.

ACTION on a foreign judgment.

By an award made on August 2, 1949, in an arbitration between the parties in New York, the defendants were held to have broken a contract dated March 21, 1949, for the sale of some goods to the plaintiffs by failing to ship or deliver the goods, and the date of the breach was found to be June 13, 1949. There was an appeal, and the award was upheld on December 7, 1949. On May 11, 1950, judgment was given on the arbitration award in the plaintiffs' favour in the Supreme Court of New York. In the interval, on September 20, 1949, the rate of exchange which had previously at all material times been United States $4.03 to the pound sterling became $2.80 to the pound, and had remained so up to the present time. Judgment had already been entered for £8,131 4s. 9d. on the basis prevailing before the devaluation of sterling, and this was sufficient if the

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

rate of exchange had to be calculated on June 13, 1949, or at some date before September 20, 1949. But a further sum of £3,571 18s. 8d. was due if the judgment was to be entered in this action at a rate of exchange which would give the plaintiffs the amount in dollars equivalent to the amount of the American judgment on May 11, 1950.

Mocatta Q.C. and *Peter Bristow* for the plaintiffs. A foreign judgment creates a debt which is enforceable by action in this country: rule 86 in Dicey's Conflict of Laws, 6th ed. The rate of exchange is to be reckoned at the date when the debt becomes due: see *Madeleine Vionnet et Cie.* v. *Wills.*[1]

Pascoe Hayward Q.C. and *I. H. Jacob* for the defendants. The plaintiffs may sue either on the foreign judgment or on the original breach of contract. If the plaintiffs' argument prevails there would be the anomalous position that the plaintiffs can, by choosing between suing on the original breach of contract or on the foreign judgment, obtain damages of different amounts due to the devaluation of the pound. It is submitted that there is no binding decision on the subject, and on the principle according to the normal law of contract, conversion should be made at the date when the defendants were in breach of their contract with the plaintiffs which gave rise to the liability. The Exchange Control Act, 1947, has no application, since the Act does not apply to contracts governed by foreign law.

Mocatta Q.C. replied.

Cur. adv. vult.

April 8. SELLERS J. The sole question for decision is whether the conversion of the amount in dollars of the foreign judgment and costs into pounds sterling, in which alone the English judgment can be given, is to be made at the rate of exchange ruling at the time of the foreign judgment or at some other time.

On behalf of the defendants it is said that the question is open as it has not been the subject of a binding decision; and it is alleged that, in the circumstances of this case and on principle, the conversion should be made at the rate of exchange ruling not at the date of the foreign judgment but at the date when the defendants were in breach of their contract with the plaintiffs which gave rise to this liability. The parties have agreed the facts and exhibited the relevant documents.

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[1] [1940] 1 K.B. 72.

[His Lordship stated the facts and continued:] As far back as 1831, in *Scott* v. *Bevan*,[2] a claim was made to enforce in this country a judgment obtained by the plaintiff in Jamaica. The headnote is as follows: "In an action brought in England to "recover the value of a given sum Jamaica currency, upon a "judgment obtained in that island, the value is that sum in "sterling money which the currency would have produced "according to the actual rate of exchange between Jamaica and "England at the date of the judgment."

It appears that the only point taken, as counsel for the defendant indicated in that case, was whether the rate of exchange to be applied was the actual rate ruling between the two countries or the par rate of exchange, and therefore it is perhaps strictly accurate to say that it does not decide the point now in issue. But the original liability of the defendant was for damages for some breach of duty established in the Jamaica action, and the judgment quantified the amount due to the plaintiff. Neither Lord Tenterden C.J., in his judgment, nor the other judges, nor any of the counsel, seem to have questioned that the material date for calculating the conversion was the date of the Jamaican judgment. Neither has that date been criticized when the case has been referred to on occasions since, as one might have expected from the judges who have considered it if they had thought the decision wrong in this respect, although it is, I think, correct to say that the point never called for express consideration. I am omitting a criticism of McCardie J. based on what would seem to be a misreading of the decision.

The plaintiffs here base their claim on the foreign judgment. That is the cause of action and it creates the debt, they allege, which is enforceable by action in this country. They rely on a statement of the law expressed in rule 86 in Dicey's Conflict of Laws, 6th ed., at p. 403, which is in these terms: "Subject to "the exceptions hereinafter mentioned, a valid foreign judgment "in personam may be enforced by an action for the amount due "under it if the judgment is (1) for a debt, or definite sum of "money; and (2) final and conclusive, but not otherwise." None of the exceptions is relevant, but at p. 410 there is set out a sub-rule: "A valid foreign judgment does not of itself extinguish "the original cause of action in respect of which the judgment "was given."

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[2] (1831) 2 B. & Ad. 78.

It was alleged and relied on by the defendants, but not conceded by the plaintiffs, that instead of suing on the foreign judgment, the plaintiffs could have proceeded in this country on the original cause of action, namely, the breach of contract. In that case the damages would be assessed at the date of the breach of contract if the action were successful: see *Di Ferdinando* v. *Simon, Smits & Co. Ld.*[3] The defendants submitted that that being so, the court should hold that the date of the breach of contract should in both cases be held to be the date when the rate of exchange had to be applied, otherwise it would vary according to which course the plaintiffs took, either to enforce the judgment obtained in New York or to start a fresh action here.

For myself I see less objection to a plaintiff who has obtained judgment rather than a defendant who is in default being in a position to select the most advantageous course. A rigid rule may have the advantage of certainty, but I apprehend that in some circumstances it might prove advantageous to the party in default, and equally disadvantageous to the innocent party. Rates of exchange may in a given period vary, first in one direction and then in the opposite; and it may be that the fluctuations of the exchange market might give scope to either of the parties concerned to turn it to his advantage by expediting or delaying the steps he takes. McCardie J. envisaged this in *Lebeaupin* v. *Richard Crispin & Co.*,[4] but I do not think that the advantage would always be as one-sided as the judge there indicated. It is, however, not open to me to apply some sort of equitable rule which would seek to ensure the fairest award when the parties' dealings have been affected by variations in the rate of exchange. The American judgment was a judgment for a fixed sum, and was final and conclusive. In *In re Henderson; Nouvion* v. *Freeman*,[5] in the Court of Appeal, Cotton L.J. stated the law in this way: "What is required in England in order that a "foreign judgment may be sued upon here as giving a good "cause of action? A foreign judgment does not, in the view of "an English court, merge the original cause of action, but if "the party likes to proceed here on his original cause of action "he may do so, notwithstanding the foreign judgment. If he "elects to proceed on the foreign judgment, then he must show "that the matter has been adjudicated upon by a competent "court and that the adjudication is final and conclusive."

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[3] [1920] 3 K.B. 409.

[4] [1920] 2 K.B. 714, 722.

[5] (1887) 37 Ch.D. 244, 250.

In the same case, in the House of Lords, Lord Herschell put the matter in this way[6]: "Now, my Lords, there can be no "doubt that in the courts of this country effect will be given to "a foreign judgment. It is unnecessary to inquire upon what "principle the courts proceed in giving effect to such a judg-"ment, and in treating it as sufficient to establish the debt. "Reliance was placed upon a dictum by Parke B. and Alderson "B. in the case of *Williams* v. *Jones*,[7] where the law is thus "stated: 'Where a court of competent jurisdiction has adjudi-"'cated a certain sum to be due from one person to another, "'a legal obligation arises to pay that sum, on which an action "'of debt to enforce the judgment may be maintained.' But "it was conceded, and necessarily conceded, by the learned "counsel for the appellant, that a judgment, to come within the "terms of the law as properly laid down, must be a judgment "which results from an adjudication of a court of competent "jurisdiction, such judgment being final and conclusive."

It may be an open question for a higher court whether a debt expressed in foreign currency must, in litigation in this country, be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable or with reference to the day of the judgment in the English court. That was not the contention on behalf of the defendants, for in the present case the result would be the same. In the case of the enforcement of a foreign judgment I would follow the most recent decision of *Madeleine Vionnet et Cie.* v. *Wills*,[8] which decided that the correct date on which to convert a debt in foreign currency sued for in this country is the date on which the debt became due. This is in accord with *Scott* v. *Bevan*,[9] which, after all these years, should be followed unless there are impelling reasons to the contrary. The decision also makes for uniformity between a foreign judgment which can be registered and one which has to be enforced by action. By the Foreign Judgments (Reciprocal Enforcement) Act, 1933, it is provided by section 2 (3): "Where the sum payable under a judgment "which is to be registered is expressed in a currency other than "the currency of the United Kingdom, the judgment shall be "registered as if it were a judgment for such sum in the "currency of the United Kingdom as, on the basis of the rate "of exchange prevailing at the date of the judgment of the "original court, is equivalent to the sum so payable."

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[6] (1889) 15 App.Cas. 1, 8.

[7] (1845) 13 M. & W. 628, 633.

[8] [1940] 1 K.B. 72.

[9] 2 B. & Ad. 78.

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EAST INDIA TRADING CO. INC. v. CARMEL EXPORTERS AND IMPORTERS LD.

Sellers J.

The American judgment could not be registered under that Act, there being no reciprocal arrangement between the two countries, but the principle which I have applied here gives the same result as a registration under the Act would have given.

The Exchange Control Act, 1947, has no application to this case. No question arises here such as was the subject of decision in *Cummings* v. *London Bullion Co. Ld.*,[10] to which I was referred by counsel. In my judgment, authority and good reason are against the defendants' contention that the date of the breach of the contract should be taken as the material date. The American judgment is the immediate source from which the defendants' liability flows in the present action, and no earlier date can be called into consideration.

I give judgment for the plaintiffs for the additional £3,571 18s. 8d., together with interest from May 11, 1950, on this amount only at 4 per cent., which is the rate current in our courts, although I understand that a higher rate of interest rules in the American tribunal where the judgment was originally obtained.

Judgment for the plaintiffs.

Solicitors: *Richards, Butler & Co.; Fink, Proudfoot & Waters.*

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[10] [1952] 1 K.B. 327.

1952
April 28, 29.

Parker J.

HANILY *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

Town and Country Planning—Compulsory purchase order—Owner's refusal to sell land at existing use value to purchaser with planning permission to develop—Planning permission obtained without owner's consent or knowledge—Persons entitled to apply for planning permission—Notice to owner of application for planning permission unnecessary—Second purchaser willing to pay price in excess of existing use value—Compulsory purchase by Central Land Board—Planning permission and compulsory purchase order valid—Acquisition of Land (Authorization Procedure) Act, 1946 (9 & 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 15—*Town and Country Planning Act,* 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 43.

In 1950 the owner of land offered it for sale for some £2,000 to a firm of metal workers wishing to acquire it in order to build a factory. Unknown to the owner the firm had in 1949 obtained from the London County Council planning permission for the erection of their factory on the land in question; and after having the land valued on an existing use value basis they refused to pay more than £450 for it, a sum which the owner refused. The firm accordingly applied to the Central Land Board for the board to exercise their powers of compulsory purchase under section 43 of the Town and Country Planning Act, 1947, with the result that in April, 1950, the district valuer negotiated with the owner for the purchase of the land by agreement; but no agreement was reached. The owner subsequently agreed to sell the land for £1,750 to a second purchaser who wished to build a joinery workshop on the land. On July 14, 1950, the board made a compulsory purchase order in respect of the land and this was confirmed by the Minister after an inquiry.

The owner sought to have those orders quashed on the ground that the making of them was not within the powers conferred on the board by section 43 of the Act of 1947 in that (1) at the time when the orders were made there was no planning permission under Part III of the Act for the development of the land; and (2) that the orders were made, not for the purpose of the functions of the Central Land Board or for the purpose of bringing the land into development, but for the purpose of preferring one approved development of the land to another:—

Held, (1) that under Part III of the Act of 1947 anybody who genuinely hoped to acquire the interest in the land could properly apply for planning permission to develop the land; that no notice need be given to the owner of land that any application for planning permission had been made in respect of the land by another person, and that, accordingly, the planning permission which the firm had received was valid even though the application was made without the owner's consent or knowledge; and

(2) that the owner's acceptance of the offer of £1,750 for the land constituted a real threat that if the board did not exercise their powers under section 43 the land would be sold at more than its existing use value; that the board were therefore entitled to use their powers in order to prevent such a sale and the orders were validly made.

Per Parker J.: Even if the planning permission granted to the firm (contrary to his decision) were held to be invalid, it did not follow that the compulsory purchase order and its confirmation would be ultra vires, since it was sufficient if at any moment before the actual acquisition of the land, planning permission had been obtained.

Travis v. *Minister of Local Government and Planning* [1951] 2 K.B. 956 followed.

MOTION pursuant to paragraph 15 of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946.

The applicant, Winefride Agnes Hanily, was the owner of about 0·21 of an acre of land at Southend Lane, Sydenham, on

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which stood eight cottages either condemned or partly demolished and condemned. In January, 1950, she offered the land for sale at a price between £2,100 and £2,300, and Blanshard Brothers, a firm of sheet metal workers, who wished to acquire the land in order to build a small factory, entered into negotiations with her. Unknown to the applicant, Blanshard Brothers had on October 7, 1949, applied for and on December 16, 1949, received from the London County Council planning permission for the erection of the factory which they proposed. After having the land valued on an existing use value basis, Blanshard Brothers were refusing to pay more than £400 or £450 for it, an offer which was rejected by the applicant.

Early in 1950 Blanshard Brothers requested the Central Land Board to exercise their powers of compulsory purchase under section 43 of the Town and Country Planning Act, 1947,[1] with the result that in April, 1950, the district valuer negotiated with the applicant for the purchase of the land by agreement; but on April 18 the applicant refused to sell at a lower price than £2,100.

On April 28, 1950, a Mr. Terry, who was a joiner, offered the applicant £1,750 for the site, on which he proposed to build a joinery workshop. The applicant accepted his offer. On July 14, 1950, the Central Land Board made a compulsory purchase order in respect of the land and the Minister, after causing an inquiry to be held, confirmed the order on December 20, 1950.

The applicant sought to have the compulsory purchase order and the confirmation order quashed on the grounds that the making of them was not within the powers which section 43 of the Act of 1947 conferred, in that (1) the orders were made, not for the purpose of the functions of the board or for the purpose of bringing the land into development, but for the purpose of preferring one approved development of the land to another; and alternatively (2) that, at the time of the making of the orders in question, there was no planning permission under Part III of the Act of 1947 for the development for the purpose of which the land was to be disposed.

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[1] Town and Country Planning Act, 1947, s. 43 (1): "The Central "Land Board may, with the approval "of the Minister, by agreement "acquire land for any purpose con"nected with the performance of "their functions under the following "provisions of this Act, and in par"ticular may so acquire any land for "the purpose of disposing of it for "development for which permission "has been granted under Part III of "this Act on terms inclusive of any "development charge payable under "those provisions in respect of that "development."

S. 43 (2): "If the Minister is "satisfied that it is expedient in the "public interest that the board "should acquire any land for any "such purpose as aforesaid, and that "the board are unable to acquire the "land by agreement on reasonable "terms, he may authorize the board "to acquire the land compulsorily in "accordance with the provisions of "this section."

Sir Arthur Comyns Carr Q.C. and *Kekwick* for the applicant. The orders were not within the powers conferred on the Central Land Board by section 43 of the Town and Country Planning Act, 1947. *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning* [2] is distinguishable for two reasons: in the present case no valid permission was granted under the Act of 1947 for the development of the land; and there was a contravention of section 70 (2) of the Act as the compulsory purchase order was made for a different purpose, namely, preferring one development of land to another.

The planning permission which Blanshard Brothers obtained was so much waste paper as the application was not made by the owner or with her consent. Although section 14 (1) of the Act is silent on the question of who may validly apply for planning permission, it is in almost identical terms with section 10 (3) of the Town and Country Planning Act, 1932, and in *Ayles* v. *Romsey and Stockbridge Rural District Council* [3] Vaisey J. said of an applicant under the Act of 1932 that he might be a person who had a present or prospective interest in the land, but he had difficulty in supposing that a person whose interest was only that he might be concerned as a contractor in building might be an applicant. That decision shows that an applicant must be someone who either has an interest in the land or who has the owner's consent to the application. If that were not so, anyone could go secretly behind the owner's back to obtain planning permission and then threaten him with compulsory purchase. Sections 18 to 23 indicate by general inference that the only person concerned with planning permission is the owner or someone authorized by him.

Even if the owner's consent to an application is not necessary, it is necessary to notify him of any application in respect of his land to give him an opportunity of being heard. At the lowest there must be notice; at the highest there must be consent. Apart from article 12 of the Town and Country Planning (General Development) Order, 1948 (S.I. No. 958), which provides for applications to be noted in a register, there is no specific requirement that a person must receive any notification of applications made in respect of his land; but in the absence of statutory provisions, *Rex* v. *Hendon Rural District Council; Ex parte Chorley*,[4] shows that proceedings before a town planning authority are in the nature of judicial proceedings, and it therefore follows that interested parties, and above all the owner, must at least be informed of the proceedings and given an opportunity of being heard.

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[2] [1952] A.C. 362.

[3] (1944) 88 Sol.J. 135.

As the planning permission which Blanshard Brothers obtained was invalid, the compulsory purchase order was ultra vires. Devlin J.'s decision in *Travis* v. *Minister of Local Government and Planning*,[5] which was given between the hearing of *Earl Fitzwilliam's* case[6] in the Court of Appeal and the House of Lords,[7] is in conflict with the speeches in the House of Lords. The speeches of the House of Lords show that permission must have been granted by the time the compulsory purchase order was made, whereas Devlin J. held that it was sufficient if it were granted by the time the land was actually disposed of. The relevant date when considering when permission must be obtained is that at which the Central Land Board take action, otherwise the whole scheme of compulsory purchase might become nugatory if, after the making of a compulsory purchase order, planning permission were withheld.

Secondly, the orders were invalid as they were made for the purpose of preferring one approved development of land to another. The facts of this case differ from those in the *Earl Fitzwilliam* case,[7] where the basis of the board's decision was that development might be hindered or prevented if land were not sold at its existing use value. Here there was no threat of hindrance to the development of land as there was in fact a purchaser willing to pay the price demanded by the owner, and the board acted wrongly in preferring Blanshard Brothers to Mr. Terry.

Sir Lionel Heald A.-G. and *Ashworth* for the respondents. As regards the argument that there was no valid planning permission in respect of this land it is submitted that there was. Nothing in the Act of 1947 limits in any way the persons who can validly apply for planning permission; in fact the natural construction of section 14 is that anyone who is interested in the land can apply. It is in accordance with common sense that a person who intends to develop the land can apply for permission to do so. Article 12 of the Town and Country Planning (General Development) Order, 1948, provides for the keeping of a register of applications which is to be open to the inspection of the public, and this wide form of notice is the only one which the Act requires; no other notice is necessary.

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[4] [1933] 2 K.B. 696.

[5] [1951] 2 K.B. 956.

[6] [1951] 2 K.B. 284.

[7] [1952] A.C. 362.

Even if there were no valid permission before the making of the compulsory purchase order, the order was not ultra vires: see *Travis* v. *Minister of Local Government and Planning.*[8] Nothing in the speeches of the House of Lords in the *Earl Fitzwilliam* case [9] conflicted with or cast doubt on the ratio decidendi in *Travis* v. *Minister of Local Government and Planning.*[10]

As regards the argument that the board acted wrongly in seeking to prefer one approved development of land to another, once it is accepted that the board may carry out a general policy, then even if there exists a collateral purpose in their carrying out of their general policy, the order will not be illegal. Here the preference of one approved development to another was merely collateral to the board's legitimate policy, and the order is accordingly not vitiated.

Sir Arthur Comyns Carr Q.C. replied.

PARKER J. This is a motion pursuant to paragraph 15 of Sch. I to the Acquisition of Land (Authorization Procedure) Act, 1946, on behalf of Miss Hanily, the applicant, to quash a compulsory purchase order known as the Central Land Board (Southend Lane, Sydenham) Compulsory Purchase Order, 1950, and a confirmation order entitled the Central Land Board (Southend Lane, Sydenham) Compulsory Purchase Confirmation Order, 1950, on the ground that the making of those orders was not within the powers of section 43 of the Town and Country Planning Act, 1947, pursuant to which they purported to be made, which empowered the Central Land Board to acquire land in certain circumstances.

[His Lordship read section 43 (1) and (2) of the Town and Country Planning Act, 1947, stated the facts and continued:] The grounds on which this motion is moved were four in number, the fourth being by way of amendment, no doubt as a result of the decision of the House of Lords on this particular section in *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning.*[11] The first two grounds were abandoned, and the case has been argued on grounds (iii) and (iv).

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[8] [1951] 2 K.B. 956.

[9] [1952] A.C. 362.

[10] [1951] 2 K.B. 956.

[11] [1952] A.C. 362.

Ground (iii) was that the orders were made, not for the purpose of the functions of the Central Land Board or for the purpose of bringing into development the land to which the orders relate, but for the purpose of preferring one approved development of the land to another; and ground (iv) was, alternatively, that at the time of the making of the orders and each of them there was no planning permission under Part III of the Act for the development for the purpose of which the land was to be disposed. Those two grounds were argued before me in the reverse order and I will follow the order in which they were argued.

It is said that the document of December 16, 1949, which purported to give Blanshard Bros. permission to erect a factory, is in effect so much waste paper; that it is invalid and a nullity in that if I accept Miss Hanily's evidence on affidavit—which I do—the application was not made by her or with her consent, she being in October, November and December, 1949, the owner of the land. It is to be observed that section 12 and the other sections in Part III of the Act of 1947 are completely silent on the question who should be the applicant; whether it can be anybody or only the owner, or somebody in between the two who either has, or is about to have, some interest in the land.

Reference was made to *Ayles* v. *Romsey and Stockbridge Rural District Council*,[12] which was decided by Vaisey J. on March 16, 1944. The case concerned section 10 of the Town and Country Planning Act, 1932, which is replaced, if not verbatim, in very much the same wording, by section 12 of the Act of 1947. The case is, I think, authority for this, that it is not anybody who can validly make an application for planning permission. The applicant in that case for planning permission and the plaintiff in the action was a builder who, if his clients bought the land and obtained planning permission, would carry out the development for them. He deposited plans and applied for planning permission, which was refused. He thereafter brought an action for a declaration that in effect he had been, or should have been, granted planning permission. The report reads: "Vaisey J. said that he was not disposed to think that an applicant under section 10 (3) need necessarily have a present "interest in the land. He might be a person who had a present "or prospective interest in the land, but he had difficulty in supposing that a person whose interest was only that he might be

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[12] 88 Sol.J. 135.

"concerned as a contractor in building would be an applicant. "The applicants should have been the owners of the land or the "three persons who proposed to develop the land if consent were "given."

It is rightly said that that is at least authority for this, that it is not anybody who can validly make an application for planning permission, but Sir Arthur Comyns Carr went further and said in his first contention that the only person who can make such an application is the owner of the land or a person who is a prospective purchaser but who has the owner's consent. It is clear that Miss Hanily knew nothing about it at all.

In my view there is nothing in Part III of the Act stating expressly or even impliedly that the applicant must be the owner or somebody applying with the owner's consent. If one looks at the matter under the earlier legislation and before this difficult section—section 43—became part of the law, it was clearly to any owner's benefit and advantage that planning permission in respect of his land should be given, and it mattered not to him who obtained that permission. Once permission was obtained it would enhance the value of his land and he would be the last person to complain. It seems to me that under Part III of this Act anybody who genuinely hopes to acquire the interest in the land can properly apply for planning permission.

Reference has been made to sections 18 to 23 inclusive as containing a general implication that the person applying should be the owner or somebody with the owner's consent. I confess that I get very little help from those sections. More help is to be gained from the fact that the only person who can appeal to the Minister under the provisions for appeal laid down in section 16 of the Act, and the only person whom it is contemplated will be an aggrieved person, is the applicant himself.

In the alternative it was contended that even if the application need not be by the owner or with his consent, at least the planning authority must notify the owner and give him or her an opportunity to raise objections and generally of being heard. It is to be observed that, again, there are no provisions either in the statute, the sections, the schedules or the statutory instrument relating to town planning concerning such matters as advertisement or notification of any particular person or of the owner. Indeed, it would appear that the only provision in regard to informing people of applications and permissions was contained in article 12 of the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958), which provided for a register to be kept in which particulars of any application for permission must be made and of any resulting decisions. Provision is made for that register to be kept in a particular form and at a convenient place, and section 14 (5) of the Act of 1947 provides that such a register shall be available for the inspection of the public at all reasonable hours.

Apart from that, I accept that there is no statutory provision whatsoever for informing people, likely objectors or the owner, of an application which has been made and is being considered. It was said, however, that although there is no such statutory provision, the proceedings before the town planning authority are in the nature of judicial proceedings and that on general principle in such proceedings the tribunal must give any person likely to be affected or interested an opportunity of appearing before it and being heard. Reference was made to *Rex* v. *Hendon Rural District Council; Ex parte Chorley*,[13] but it is to be observed that in that case the rural district council, though not apparently bound to do so, did in fact give notice of the application.

It is true that proceedings before a town planning authority may well be in the nature of judicial proceedings so that certiorari will lie, but it does not follow from that that any particular procedure such as is adopted in courts of law must be adopted in these proceedings. In my view one must look at the legislation in question and see whether under that legislation justice requires that persons or any particular person should be notified and heard. Under this scheme of legislation I can see no ground for saying that any particular notice should be given to an owner, or that the owner should be given an opportunity of being heard.

I need say no more, in the circumstances of this case, in regard to the first point, because in my view this planning permission was valid. It has, however, been argued that, if I were wrong in that and if the planning permission were invalid, it does not follow that the orders in question were ultra vires because it is sufficient if at any moment before the actual acquisition of the land planning permission has been obtained, and these orders of course do not amount to an acquisition of the land but merely give authority for its acquisition. On behalf of the Crown reliance was placed on the decision of Devlin J. in *Travis* v. *Minister of Local Government and Planning*.[14] The first part of that decision, as set out in the headnote, reads: "*Held*, that, even assuming "that the planning permission must be granted at the time of

[13] [1933] 2 K.B. 696.

[14] [1951] 2 K.B. 956.

"acquisition, the applicant had failed to show that permission "had not been granted at the time of acquisition, as the com- "pulsory purchase order was not and could not be the acquisition "of the land: it was no more than a draft which was submitted "to the Minister for his consideration and confirmation, and "even when confirmed it had no legal effect, but merely autho- "rized the board to acquire the land; that section 43 meant no "more than that at the time of acquisition the board might not "acquire the land unless permission had by that time been "granted."

That decision was given between the hearing of *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning* in the Court of Appeal [15] and its decision in the House of Lords,[16] and it was argued on behalf of the applicant that if one considers the speeches in the *Earl Fitzwilliam* case [16] in the House of Lords it is to be inferred that Devlin J.'s decision is inconsistent with the speeches in the House of Lords. It was further said, with very considerable force, that although a meticulous reading of section 43 of the Act might support Devlin J.'s decision, no court should be astute to read those words meticulously having regard to the possible results which would follow: because if Devlin J.'s decision were right there might be negotiations for a purchase by agreement, there might be a compulsory purchase order, and a public inquiry, there might be a confirmation by the Minister, there might be a notice to treat and an arbitration, and if at the end of that and immediately before the acquisition was going to be completed the planning authorities were to be approached for the first time and refused permission, the whole of the previous proceedings would have been a complete and utter farce.

It seems to me, first, that there is nothing in the speeches in the *Fitzwilliam* case [16] which throws any light on Devlin J.'s decision. The point was not present, I think, in any of their Lordships' minds, and in those circumstances I think that it would be quite wrong to take isolated words from speeches and seek to argue that they differ in some way from the decision arrived at by Devlin J. That being so, I consider myself bound by, and follow, Devlin J.'s decision, with which I entirely agree. While appreciating the argument that if it is right, an absurd position might be created in certain circumstances, I am of opinion that the real safeguard is to be found in the powers to be exercised by the Minister, because no land can be acquired by agreement without his approval. No land can be compulsorily acquired without the order being confirmed by the Minister, and no doubt as a matter of administration he would take good care that his approval was not given or a confirmation order made unless planning permission had been obtained or was on the point of being obtained.

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[15] [1951] 2 K.B. 284.

[16] [1952] A.C. 362.

The other point which was taken on behalf of the applicant was that the Central Land Board were in effect preferring one person to another. It was said that a close scrutiny of the speeches in the *Earl Fitzwilliam* case in the House of Lords[16] shows that the power given by section 43 of the Act of 1947 can only be used if development were threatened to be held up. As it was put, if there are one or more developers who are willing to pay the price asked, albeit above the existing use value, and in addition to pay the development charge, this power cannot be exercised; it can only be exercised if there is a single developer available and he refuses to pay the price asked and the development charge and will not buy unless he can buy at the existing use value.

I am of the opinion that that cannot be said to follow from the speeches in the House of Lords. As I understand it, the Court of Appeal have clearly said that the board may exercise their powers to prevent sales at more than the existing use value. If one pauses there, it is clear in this case that when Mr. Terry came on the scene on April 28 and his offer to pay £1,750, which was in excess of the existing use value, was accepted, there was a real threat that if the Central Land Board did not exercise their powers the land would be sold at over existing use value.

I think that there is nothing in the speeches in the House of Lords which would lead one to suppose that they disapproved of the Court of Appeal's interpretation of the board's powers. For my part, I get most assistance from the speech of Lord Tucker, who said[17]: "I think that unrestricted sales on a large scale at "prices in excess of existing use value would render more difficult "the proper ascertainment of the true existing use value, which "is a necessary element in calculating the development charge, "and that, it being the function of the board to collect the charge, "to set it against the payments which they will have to make "out of the £300m. compensation fund, a policy which tends "to facilitate and ensure a speedy payment of the charge by

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[16] [1952] A.C. 362.

[17] Ibid. 386.

"including it in the sale price is a policy the implementing of "which is connected with their fiscal functions under the Act."

In my view, if the argument on behalf of the applicant is right and the board cannot exercise their powers if there is a developer willing to pay the development value plus the development charge, the functions of the board would become almost impossible, because an existing use value must presumably bear some relation to existing facts and if a series of sales in excess of the current existing use value were permitted and went through, a time would come when the existing use value would become equivalent to the development value. It seems to me that it must be part of the board's functions to prevent sales over existing use value and that in the circumstances there was a real reason to believe that Miss Hanily left to herself would sell this land at more than its existing use value.

Accordingly, I see nothing ultra vires in the order made by the board or the order of confirmation by the Minister. In those circumstances this motion must be refused.

Motion dismissed.

Solicitors: *Stow & Co.; The Treasury Solicitor.*

S. C.

GOLDTHORPE *v.* BAIN.

[Plaint H. 47.]

C. A.

1952
May 15, 16.

Somervell, Jenkins and Morris L.JJ.

Landlord and Tenant—Rent restriction—Possession of dwelling-house—Unconditional order made in favour of landlord—Greater hardship—Death of landlord before order became effective—Claim to possession by daughter as beneficiary under landlord's will—Whether order continued to be effective—Change of circumstances—County Court Rules, 1936, *Ord.* 25, *r.* 6.

The owner of a dwelling-house obtained an order for possession on the ground of "greater hardship," but she died before the date when the order could be executed. By her will she left the property to her daughter, the present plaintiff, who with the assent of the personal representatives of the deceased, brought the action, claiming to enforce the order granted to her mother and also asking for possession in her own right. The county court judge dismissed the action, holding that the order granted to the mother was personal to her and ceased at her death and that the tenant was entitled to judgment on the issue of greater hardship.

The plaintiff appealed:—

Held, that the order for possession granted to the mother did not cease at her death, but devolved to her personal representatives, heirs or beneficiaries. The plaintiff was therefore entitled to enforce it, but subject to the right of the tenant to apply to the judge under section 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to extend the time for giving up possession.

Observations of Lord Greene, in *R. F. Fuggle Ld.* v. *Gadsden* [1948] 2 K.B. 236, 243 approved and applied.

APPEAL from Judge Batt, sitting at Macclesfield County Court.

On March 8, 1951, Mrs. Goldthorpe applied to the county court judge for an order for possession of a dwelling-house on the ground that she required it for the use of herself and her family. The tenant raised the defence of greater hardship but the judge made an order for possession to become effective on November 30, 1951. On August 30 of that year Mrs. Goldthorpe died, and by her will left the dwelling-house to her daughter, the present plaintiff. In October, 1951, the tenant, the present defendant, applied to the judge under section 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which gives power to the court to extend the time of the execution of a possession order or to suspend or stay such execution. The judge held that the application was misconceived in that there was no one at the moment able to enforce the order, because the successor in title had not applied under Ord. 25, r. 6, of the County Court Rules, 1936, for leave to issue the necessary process. In March, 1952, Miss Goldthorpe brought the present action for possession under the order of March 8, 1951, and also on the ground that she required the premises for her own use.

The judge dismissed the action. He held that the order of March 8, 1951, was personal to Mrs. Goldthorpe and its effect ceased on her death. On the question of greater hardship he found for the tenant.

The plaintiff appealed on the question whether the order made in favour of Mrs. Goldthorpe continued to be effective after her death.

R. E. Megarry for the plaintiff. The short point of the appeal is whether the present plaintiff, as beneficiary under the will of her mother, is entitled, with the assent of the personal representatives of her mother, to enforce against the tenant the order for possession granted to her mother. Proceedings under Ord. 25, r. 6, of the County Court Rules, 1936, could have been taken for the purpose of substituting the mother's personal representatives in regard to the issue of process, but no such application was made to the court and the plaintiff claims to enforce the original order and also to be entitled to possession in her own right. The judge has held that the order for possession given to the mother must be treated as personal to her and on her death becoming a nullity. The Rent Acts interpose a barrier between the landlord and his common law rights, but once that barrier has been surmounted an order for possession becomes an order at common law. The occupier ceases to be a tenant within section 12 (1) (*g*) of the Act of 1920 after an order for possession has been made: see *American Economic Laundry Ld.* v. *Little.*[1] The making of the order for possession fundamentally altered the status of the tenant, who may be said to have remained in occupation merely by licence of the court. The order was unconditional. It was simply an order to deliver up possession of the land. It was obtained by a particular person, but there is nothing in its nature which makes it inappropriate for enforcement by the descendants of the deceased landlord. In *R. F. Fuggle Ld.* v. *Gadsden* [2] it was laid down by Lord Greene M.R. that on appeal regard should not be had to events happening after an order was made which if they had happened before the hearing might have led to a different conclusion. The court is bound by the conditions existing at the time when the order was made.

Niall MacDermot for the defendant. There is no question here of any attempt to transform or change the order in the light of subsequent happenings. The dicta in *Fuggle Ld.* v. *Gadsden* [2] really have no application to the present case. It is not strictly accurate to say that a statutory tenant ceases to be a statutory tenant once an order for possession has been made. His rights are changed, but he still remains a statutory tenant in the sense that he remains a person having certain rights, and his full rights can be restored to him by order under section 5 (2) of the Act of 1920.[3] The landlord's right to recover possession arises out of the terms and provisions of the Rent Acts, and he obtains his right to possession by virtue of the order of the court. His right is subject to the terms of that order. The landlord having obtained an order by reason of his own personal condition, his right is subject to that condition. He has not got a complete order until the end of the suspension period, and by reason of the landlord's death there never was a completed right to possession which passed to the new landlord.

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[1] [1951] 1 K.B. 400.

[2] [1948] 2 K.B. 236, 243.

[3] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2): "At the time of the application for or the making or giving

SOMERVELL L.J. stated the facts and continued:—The question as to the position of the court's order and the plaintiff's right to anything under it was treated by agreement between the parties (and this is stated in the judge's judgment) as if it were the trial of an issue or question within Order 25, rule 6 (1), of the County Court Rules, 1936, the relevant part of which reads as follows: "Where any change has taken place after judgment, "by death, assignment, or otherwise, in the parties entitled to "enforce a judgment or order . . . the party claiming to be "entitled to enforce the judgment or order may apply on "affidavit to the court for leave to issue the necessary process, "and the court may—(i) if satisfied that the party so applying "is entitled to issue such process, make an order to that effect; "or (ii) if not so satisfied, order that any issue or question neces-"sary to determine the rights of the parties be tried in an "action." It may be that the normal issue under that rule would be where the two contestants were two people claiming the right to enforce an order. An assignee may dispute an assignment, and so on. The issue here is this: the tenant is saying "Owing to the nature of the order obtained by your "mother and the ground on which it was obtained you are not "entitled to enforce it." The county court judge treated that (and if I may say so, rightly treated it) as a matter which there was jurisdiction to determine under a direction under rule 6 (1) (*a*) (ii). He decided that it was a personal right and never

"of any order or judgment for the "recovery of possession of any such "dwelling-house, or for the ejectment "of a tenant therefrom, or in the "case of any such order or judgment "which has been made or given, "whether before or after the passing "of this Act, and not executed, at "any subsequent time, the court may "adjourn the application, or stay "or suspend execution on any such "order or judgment, or postpone the "date of possession, for such period "or periods as it thinks fit, and sub-"ject to such conditions (if any) . . . "as the court thinks fit, and, if such "conditions are complied with, the "court may, if it thinks fit, dis-"charge or rescind any such order or "judgment."

descended to the personal representatives, or on their assent to the plaintiff, as beneficiary under the will. He said: "It seems "to me to offend common sense and justice to say that the "personal representatives of the deceased landlord can glean "the benefit of an order made because of hardship to the "deceased." He then refers to a case to which we were referred and which I will mention, though I do not think it very much assists. That was *American Economic Laundry Ld.* v. *Little.*[4] That was a case like this, where a final order for possession had been made against the tenant and it was suspended for a time. During the period of that suspension he died. His daughter then claimed that she was entitled to operate for her benefit the familiar provisions of section 12 (1) (*g*) of the Act of 1920, which deal with relations living with tenants at the time of their death. This court held she could not do that, and that the order for possession fundamentally altered the position. It was pointed out that certain incidents of the original contractual tenancy which would have continued when a statutory tenancy was established, continued still to affect the relationship after an order for possession had been made. The court held, however, that a person in occupation in those circumstances was not a tenant within section 12 (1) (*g*). Mr. Megarry here relied on that, and it has perhaps some importance in the issue.

The county court judge does not seem to have been referred, as we were, to a case which I think is of importance, *R. F. Fuggle Ld.* v. *Gadsden.*[5] That was a case where possession was claimed under paragraph (*g*) by a landlord on the ground that the house was reasonably required for the occupation of a person in his whole-time employment. The main point decided does not assist. The county court judge had held that the premises were reasonably required by the plaintiff for his employee, but that he was bound by some earlier decision not to give possession. The main part of the appeal held that his ground for not giving possession was a bad ground, and that the plaintiff ought to have been given an order for possession; but we are not concerned with that. What is of assistance is a subsidiary point which arose. By the time the case came to this court the workman, for whom the plaintiffs required the house, had left their employment. The basis, therefore, in one sense, of their application had disappeared, and counsel very properly brought this to the attention of the court.

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[4] [1951] 1 K.B. 400.

[5] [1948] 2 K.B. 236.

Lord Greene M.R. said this [6]: "Now what is the position of "this court? On the matter as it stood at the hearing, and on "the facts as they existed at that date, and as found by the "judge, once the judge's error of law, if I may respectfully put "it so, is put right, the order would automatically follow. But "here is something which has happened subsequent to the "hearing which, if it had happened before the hearing took "place, might have put a different complexion on the action, "and might have led the county court judge to take a different "view from that which he did take on the facts. What ought "this court to do? Ought it to pay regard to some matter "which has happened since the hearing which, if it had "happened before the hearing, might have affected the judge's "findings of fact?" He held that the court could not proceed on that basis, and what he says is to a large extent based on the position of this court. But it is interesting, I think, and helpful in this case, because it shows that this court will allow an appeal, and make an order for possession, when, on the facts as they have developed since the hearing, the basis of the application has disappeared. I think that is helpful in considering whether the county court judge was right in holding that the effect of the order obtained in the present case ceased on death. I do not think it does.

I accept the submission which Mr. Megarry put before us, that a landlord of a rent restricted house, who applies for possession, has a number of obstacles placed in his way by the Acts which he has to overcome if he is to obtain an order. But if, on the evidence and considering reasonableness and whatever the various matters are as proved at the hearing, the county court judge makes an order for possession, then that is an order which devolves to his personal representatives or to his heirs, or beneficiaries according to the circumstances. It is not an order which ceases on his death. It may be said there is a certain want of logic about that, and there is, of course, force in the consideration which moved the county court judge to come to an opposite conclusion. There must however be finality at some stage. It would never have been suggested that if a man who had obtained an order such as in this case, having got possession, died perhaps before he had time to move in, that the tenant could come and say the status quo ought to be re-established. Other instances could be thought of. I think the conclusion to

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[6] [1948] 2 K.B. 236, 243.

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which I have come is reinforced by the difficulties of applying to some of the other circumstances in other cases which might arise the principle which the judge based himself upon. I do not think it is necessary to illustrate or elaborate. That being so, on the issue under Ord. 25, r. 6, I would hold that the plaintiff was entitled to enforce the order.

There remains to be considered the question of section 5 (2) of the Act of 1920 and the county court judge's jurisdiction under it. I think one can get help with regard to that from *Fuggle's* case.[7] The Master of the Rolls in that case was making an order under which the tenant would have time, if so minded, to go back to the county court judge under section 5 (2). He makes it quite clear that the county court judge ought not to proceed, as it were, de novo, disregarding the order originally made, because the employee in respect of whose employment it had been made had disappeared from the scene. He indicates that that might be a reason, assuming no other employee was on the horizon, for giving the tenant rather longer than he would have done if another employee was waiting in readiness to come in. But, in my opinion, he makes it clear that the order having been made, whatever the circumstances, the county court judge ought not to give a longer period than what one might describe as the maximum, having regard to the difficulty of the tenant himself finding some other place to go to.

I think the same applies here. In the present case the successor in title does herself want to live in these premises. It may be that her needs are not as great as the needs of the father and mother and herself when both the parents were alive, but the county court judge, in my view, would be quite wrong if he did anything in the nature of giving an indefinite extension in a case such as this, or in a case where the successor in title had no desire to obtain the house for him or herself. The fact that the daughter herself does want the house is an element in favour of granting less time than if the plaintiff herself did not want the house; but even if she did not want the house for herself, in my view, the order having been obtained, she is entitled to possession in a reasonable time, and in considering a reasonable time the court should direct its mind to the difficulties, if any, of the tenant finding alternative accommodation.

For these reasons I would allow this appeal. We can consider the exact form of the order, and I would direct that the plaintiff is entitled to enforce the order, but its execution should be suspended for a month. I do not know that it would be necessary to put anything in the order, but it should be clear that it is not intended to preclude the tenant from applying under section 5 (2).

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[7] [1948] 2 K.B. 236.

JENKINS L.J. I agree. [His Lordship read section 3 (1) of the Rent Restriction Act of 1933,[8] and continued:] With the exception of the case where alternative accommodation must be provided (which is specially dealt with in sub-paragraph (*b*) and requires that the court should be satisfied that the accommodation either is available as at the date of the hearing or will be available when the order takes effect) the provisions of the section clearly contemplate that the court should consider the situation as it stands when the case comes before the court and judgment is given. At that date the court has to satisfy itself that it is reasonable to make the order, and that it has power to do so under the provisions of Sch. I to the Act.

[His Lordship read the First Schedule and continued:] In my view, having regard to the terms of section 3 and the language of the introductory passage in the Schedule,[9] the court has to satisfy itself at the hearing of the reasonableness of making the order and of the existence of one or other of the necessary conditions set out in the Schedule. These conditions vary widely in their character. Some of them refer to some default or misconduct on the part of the tenant. Sub-paragraph (*a*) deals with arrears of rent; sub-paragraph (*b*) deals with nuisance or annoyance; sub-paragraph (*e*) deals with breaches of a licence where premises are licensed for the sale of intoxicating liquor. On the other hand, certain of the provisions relate to the personal circumstances of the landlord himself. The case in (*g*) is where

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[8] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1): "No order or judgment for "the recovery of possession of any "dwelling-house to which the prin-"cipal Acts apply or for the eject-"ment of a tenant therefrom shall be "made or given unless the court "considers it reasonable to make "such an order or give such a judg-"ment, and either (*a*) the court has "power so to do under the provisions "set out in the First Schedule to this "Act, or (*b*) the court is satisfied "that suitable alternative accommo-"dation is available for the tenant or "will be available for him when the "order or judgment takes effect."

[9] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I: "A court shall, for the "purposes of section three of this "Act, have power to make or give an "order or judgment for the recovery "of possession of any dwelling-house "to which the principal Acts apply "or for the ejectment of a tenant "therefrom without proof of suitable "alternative accommodation (where "the court considers it reasonable so "to do). . . ."

"the dwelling-house is reasonably required by the landlord for "occupation as a residence for some person engaged in his whole-"time employment," and then there is (*h*), which is the paragraph relevant to this case, where the landlord requires the premises "for occupation as a residence for (i) himself, or (ii) any "son or daughter of his over 18 years of age, or (iii) his father "or mother." But whether the particular condition is one relating to the personal circumstances of the landlord, or one concerned with some default on the part of the tenant, all are subject to the overriding condition that the court should be satisfied that it is reasonable to make the order.

In this case the order was made under (*h*) of Sch. I on the ground that the then landlord, Mrs. Goldthorpe senior, required the premises for occupation as a residence for herself and her family. The question is what effect, if any, did her death have on the order made between March 8, 1951, the date of the order, and November 30, 1951, the date on which possession was directed to be given up by the order? The argument which commended itself to the judge was that in a case of this kind the order for possession, though unqualified in its terms, apart, of course, from stating a future date on which possession is to be given, is personal to the landlord who obtains it, so that if between the date of the order and the date of its actual execution the landlord dies and thus no longer requires any premises for occupation as a residence here on earth, the order becomes a nullity. I find it impossible to accept that conclusion.

It was not sought to be maintained in argument before us that every order for possession made under the Act is personal to the particular landlord who obtains it and does not enure for the benefit of his successors in title. I am not surprised at the disclaimer of this extreme position, for I think it would be most unreasonable and regrettable if (for example) in a case where an order was obtained for possession on the ground of non-payment of rent, and time was allowed for the tenant to comply with the order, the death of the landlord during the interval between the date of the order and the date fixed for the tenant's compliance with it, had the effect of putting the landlord's personal representatives to the trouble and expense of obtaining a fresh order for possession in new proceedings. Once it is conceded that in cases such, for instance, as that of non-payment of rent, the order is not personal to the landlord who obtains it, I think it is impossible to draw a distinction between orders based on a default of the tenant, such as non-payment of rent, and orders based on the personal circumstances of the landlord. In both cases, as it seems to me, the circumstances on the strength of which the landlord is seeking possession, and indeed the overriding condition as to the reasonableness of making the order, must be considered with reference to the facts as they stand at the date of the hearing, and the order, once made, is an order which, though subject to the special provisions of section 5 (2) of the Act of 1920, applicable to orders for possession in Rent Act cases, remains, notwithstanding the death of the original plaintiff, a valid order for possession, and capable of enforcement by the successors in title of the original plaintiff, upon compliance with Ord. 25, r. 6, of the County Court Rules.

In such a case, the judgment, being one which concerns a proprietary interest of the deceased landlord which would normally pass to the landlord's personal representatives, those representatives, or a beneficiary claiming through them by means of an assent, on proof to the court of the grant of probate, and of the assent, if there is one, would prima facie be entitled as of right to an order (under Ord. 25, r. 6, of the County Court Rules) declaring them entitled to enforce the order for possession.

I am fortified in the conclusion to which I have come by this consideration. At first sight the view is attractive that if a landlord has been given an order for possession on the ground that he wants the premises for his own occupation as a residence and the landlord dies before possession is actually given up, then prima facie it would appear reasonable that the order should lapse as the ground for it has lapsed. But, as I have said, I find it impossible so to hold, and I do not think that by so holding the kind of difficulty here in question would be met. There are cases in the Schedule where circumstances personal not merely to the landlord himself but to somebody else are in question. One need go no further than paragraph (*h*) of the Schedule, which includes the case where the landlord requires the premises "as a residence "for . . . any son or daughter of his over eighteen years of age; "or his father or mother." In a case such as that the landlord might obtain an order for possession because he wanted the premises as a residence for his father or mother and in the meantime before the date fixed for giving up possession under the order the father or mother might die. In such a case the reasoning which commended itself to the county court judge in the case of the landlord dying would, as it seems to me, require with equal force that, although the landlord was still alive, his order should cease to have effect because the ground on which he had obtained it had ceased to exist. In my view, that is really an impossible conclusion.

I think the question in this case is in some degree obscured by the change of parties, brought about by the death of the landlord, but really the view taken by the county court judge amounts, as I think, to this, that the court should satisfy itself that the statutory ground for ordering possession exists, and should also satisfy itself on the question of reasonableness and, where applicable, on the question of greater hardship, not simply at the date when the case is tried and judgment is given, but over again at any time when a tenant against whom an order for possession has been made may apply for an extension of time under section 5 (2). In my view, that cannot be right. It would prevent any finality in these cases. Issues of greater hardship or reasonableness, or the landlord's need of the premises as a residence for himself or some other qualified person, could be tried over and over again, and orders under the Act could thus be varied in their operation without limit or even rescinded after what, in effect, would amount to a rehearing of the whole case. In my view, therefore, one should adhere to the principle that the conditions required to enable an order for possession to be made should be judged at the date when the case is heard and judgment is delivered, and that the validity of the order is not to be affected by any subsequent event.

Accordingly, for the reasons stated by my Lord and such additional reasons as I have endeavoured to express, I agree that the proper course in this case will be to direct that the plaintiff is to be entitled to enforce the order for possession made in the original proceedings, subject to the provisions of section 5 (2) of the Act of 1920, and that any extension of the time for giving up possession, which is granted by this court today, should be without prejudice to any further application to the county court judge under section 5 (2) and that any such application made to him will fall to be dealt with in his discretion as indicated by my Lord. Accordingly I agree that the order under appeal should be varied in the sense my Lord has stated.

Morris L.J. I agree so fully with the judgments that my Lords have delivered that, though this is a case in which we are taking a somewhat different view from that taken by the county

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court judge, I do not feel that I desire to add anything to what has been said.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co., for H. F. Langstaff, Macclesfield; Clayton, Leach, Sims & Co., for O. Collier Littler & Kilbeg, Manchester.*

A. W. G.

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Apr. 2, 3;
May 4.

Somervell, Denning and Romer L.JJ.

BENDALL *v.* McWHIRTER.

[Plaint No. G. 1012.]

Bankruptcy—Husband and wife—Deserted wife allowed to remain in house owned by husband—Licence—Husband adjudicated bankrupt——Claim to possession by trustee in bankruptcy—Whether trustee takes property subject to wife's right—Procedure—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 18 (1), 22 (4), 38 (*b*), 105 (1).

The freehold owner of a house in which he lived with his family deserted his wife, telling her that she could have the house and furniture. Later she obtained a maintenance order against him on the ground of his desertion. Subsequently, he was adjudicated bankrupt, and the freehold of the house vested in his trustee in bankruptcy. The trustee brought an action to recover possession and mesne profits against the wife as a trespasser from the date of the adjudication in bankruptcy. The county court judge held that as the wife was a licensee whose licence was determined when the property vested in the trustee, he took it unfettered by matrimonial obligations; and made an order for possession with mesne profits in favour of the trustee.

On appeal by the wife:—

Held, (1) that a deserted wife in occupation of the matrimonial home has a personal licence, revocable by her husband only by obtaining an order of the court under section 17 of the Married Women's Property Act, 1882.

(2) That where the matrimonial home is a freehold house which vests in the husband's trustee in bankruptcy under the provisions of the Bankruptcy Act, 1914, the trustee takes the house subject to the wife's licence, and cannot obtain possession of it without an order of the court which could be made on an application for possession under section 105 (1) of the Bankruptcy Act, 1914.

Per Somervell and Romer L.JJ. The trustee takes no better title than the bankrupt had. He is no more entitled than was the

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

debtor before his bankruptcy to revoke the wife's licence on his own authority or to sue her for possession of the property.

Per Denning L.J. The trustee in bankruptcy takes subject to the wife's right, for this right is an equity. To seek possession alternatively to proceedings under section 105 (1) of the Bankruptcy Act, 1914, the trustee could proceed by way of originating summons in the husband's name under section 17 of the Married Women's Property Act, 1882.

APPEAL from Judge R. H. Norris, sitting at the West Bromwich County Court.

Mrs. Laura Adelaide McWhirter lived with her husband and children in a house, 1 Buttery Road, Smethwick, of which he was the freehold owner, until April 14, 1950, when he deserted her, telling her that she could have the house and furniture. On November 27, 1950, she obtained a maintenance order of £3 for herself and 30s. a week for the youngest child. On January 19, 1951, the husband was adjudicated bankrupt, and the plaintiff, Ronald Frederick Bendall, was appointed his trustee in bankruptcy.

The house was valued at £1,850 and there was a mortgage of £1,576 on it in favour of a bank. On a number of occasions the trustee in bankruptcy asked the wife to give up vacant possession of the house so that he might sell it, but she refused to do so. He then brought proceedings against her in the county court on November 23, 1951, claiming possession and £1 a week for mesne profits since the date of the adjudication in bankruptcy.

The county court judge, having said that the magistrates in making the order for maintenance doubtless took into account the fact that the defendant had the use of the matrimonial home, held that her occupation was that of a licensee and that her licence had determined when the property vested in the plaintiff. He held further that proceedings under the Married Women's Property Act, 1882, s. 17, were not open to the trustee in bankruptcy; and he accordingly made an order for possession with mesne profits in favour of the plaintiff.

The wife appealed.

Muir Hunter for the wife. It is assumed that the magistrate abated the amount of maintenance because the wife was living in the house with her husband's consent. She is thus a licensee for value with a personal interest which affects the land. Consideration has moved from her because she has abated her maintenance claim.

[SOMERVELL L.J. But that was not consideration. It was a judicial decision based on existing circumstances at the time.]

Neither maintenance nor alimony are provable debts, so the wife cannot share in the assets; but the deserted wife's right requires safeguarding as much as those of any creditor, and therefore the trustee in bankruptcy must take the property subject to her right. He is in no better position than the bankrupt.

[SOMERVELL L.J. Is her right a legal or equitable right to the land? If so, what is it, and when can it be terminated?]

Her right is a special kind of licence to occupy the house: see the cases involving the Rent Acts, beginning with *Bramwell* v. *Bramwell*,[1] which first considered the deserted wife's right in the matrimonial home. The question whether that licence is revocable or not depends on its terms: see *Brown* v. *Draper*[2]; *Hutchinson* v. *Hutchinson*[3]; *Middleton* v. *Baldock*.[4] The trustee takes the house subject to the provisions of section 17 of the Married Women's Property Act, 1882,[5] which constitute a statutory fetter in rem on the title, and must be considered in determining the nature of the licence: see *Old Gate Estates Ld.* v. *Alexander*,[6] where Denning L.J.[7] said that so long as the wife was lawfully there, even against her husband's will, the house remained within the Rent Restriction Acts, and he could not turn her out without an order of the court.

[SOMERVELL L.J. The Rent Acts created a special position; but you would have to cite very compelling authority to persuade me that a husband or wife owning a freehold cannot give a good title unless he or she gets an order under section 17 of the Act of 1882.]

Neither an order by nor even an undertaking to the court is relevant here. Once it is established that there is a licence, even without writing, its terms apply: see *Winter Garden Theatre (London) Ld.* v. *Millenium Productions Ld.*[8] To allow the husband to sell would be to evade the Act of 1882, and the court could intervene by injunction: see *James Jones & Sons Ld.* v. *Tankerville.*[9]

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[1] [1942] 1 K.B. 370.

[2] [1944] K.B. 309.

[3] [1947] 2 All E.R. 792.

[4] [1950] 1 K.B. 657.

[5] Married Women's Property Act, 1882, s. 17: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit. . . ."

[6] [1950] 1 K.B. 311.

[7] Ibid. 319.

[8] [1948] A.C. 173.

[9] [1909] 2 Ch. 404.

[ROMER L.J. In *Thompson* v. *Earthy*[10] Roxburgh J. held that the interest of a wife is not an interest in the land, either legal or equitable. How can the mere right to live in a house be converted into an interest in the land by the husband's undertaking not to sell it? The fetter on its free disposition which exists so long as it is in his possession has nothing to do with ownership; it is only the personal disqualification of the husband. How can that disqualification descend on the trustee? It is the house which descends on him.]

But he takes it on the same conditions as the husband held it.

[SOMERVELL L.J. In *Lee* v. *Lee*[11] this court upheld an order by a county court judge to prevent a husband from selling the house over his wife's head until he had found alternative accommodation for her. We regarded the power to restrain his proprietary rights as consequential under section 17.]

Yes. Notwithstanding the right a purchaser might have obtained (see *Thompson* v. *Earthy*[12]), the wife's right protected by an order would give her a kind of vested interest supported by a statute.

[DENNING L.J. Analogous to a contractual right?]

Possibly higher. See the speeches of Lord Simon, Lord Porter and Lord MacDermott in *Winter Garden Theatre (London) Ld.* v. *Millenium Productions Ld.*,[13] explaining that in the railway cases an agreement had to be construed against the statutory background. Here the right conferred on spouses by the Act of 1882 is the statutory background. Under section 17 the court decides who is to have the property and makes such consequential orders as seem just. The wife's interest is a right which is irrevocable except under the provisions of the statute.

[SOMERVELL L.J. I think the wife's right is a special one subject to statutory and discretionary provisions. It is very like a restrictive covenant in the *Tulk* v. *Moxhay*[14] line of cases.]

[ROMER L.J. That was an equity which ran with the land; but I don't think the wife has an equity here. If *Thompson* v. *Earthy*[15] was rightly decided, and the trustee in bankruptcy sold the house, a purchaser would take free of her claim.]

Roxburgh J. had those cases in mind in *Thompson* v. *Earthy*,[15] but it is not clear whether his attention was drawn to the possibility of an incorporeal right supported by no more than an injunction of the court. In any event it is submitted that that case was wrongly decided, for its result is an evasion of section 17 of the Act of 1882.

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[10] [1951] 2 K.B. 596, 599–600.

[11] Post, 489.

[12] [1951] 2 K.B. 596.

[13] [1948] A.C. 173, 191, 195, 203.

[14] (1848) 2 Phillips 774.

[15] [1951] 2 K.B. 596.

[SOMERVELL L.J. What makes this case novel is whether the Bankruptcy Act, 1914,[16] marches through the contingent protection provided by section 17 of the Act of 1882. I don't see why the husband could not go to the court under section 17 when the county court judge could take into account the competing claims.]

The bankrupt is compellable by law to do all he can to realize his property and, if he alone can apply under section 17, it is submitted that the trustee can make the husband apply.

[ROMER L.J. But section 17 is directed to questions between husband and wife; this would be a matter between the wife and the husband's creditors.]

[SOMERVELL L.J. The husband's leave for his wife to remain in the house has never been revoked. Under what authority did the trustee treat that leave as having been revoked from the making of the receiving order?]

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[16] Bankruptcy Act, 1914, s. 18 (1): "Where a receiving order is made "against a debtor, then, if the credi"tors . . . resolve that the debtor be "adjudged bankrupt . . . the court "shall adjudge the debtor bankrupt, "and thereupon the property of the "bankrupt shall become divisible "among his creditors and shall vest "in a trustee."

S. 22 (2): "He shall give such "inventory of his property . . . submit "to such examination in respect of "his property or his creditors, . . . "and generally do all such acts and "things in relation to his property "and the distribution of the proceeds "amongst his creditors, as may be "reasonably required by the official "receiver, special manager, or trus"tee, or may be prescribed by general "rules, or be directed by the court by "any special order or orders made in "reference to any particular case. . . . "(3) He shall, if adjudged bankrupt, "aid, to the utmost of his power, in "the realization of his property and the "distribution of the proceeds among "his creditors. (4) If a debtor wil"fully fails to perform the duties "imposed on him by this section, or "to deliver up possession of any part "of his property, which is divisible "amongst his creditors under this "Act, and which is for the time being "in his possession or under his con"trol, to the official receiver or to the "trustee, or to any person authorized "by the court to take possession of it, "he shall, in addition to any other "punishment to which he may be "subject, be guilty of a contempt of "court, and may be punished accord"ingly."

S. 38: "The property of the bank"rupt divisible amongst his creditors, "and in this Act referred to as the "property of the bankrupt, . . . shall "comprise the following particulars:— ". . . (*b*) The capacity to exercise and "to take proceedings for exercising "all such powers in or over or in "respect of property as might have "been exercised by the bankrupt for "his own benefit at the commence"ment of his bankruptcy or before "his discharge, . . ."

S. 105 (1): "Subject to the provi"sions of this Act, every court having "jurisdiction in bankruptcy under this "Act, shall have full power to decide "all questions of priorities, and all "other questions whatsoever, whether "of law or fact, which may arise "in any case of bankruptcy coming "within the cognizance of the court, "or which the court may deem it "expedient or necessary to decide for "the purpose of doing complete justice "or making a complete distribution of "property in any such case: . . ."

He relied on sections 18 (1) and 38 (*b*) of the Bankruptcy Act.

[SOMERVELL L.J. So the trustee does something which the husband could not do?]

Yes.

[DENNING L.J. Would it not be sensible to deal with this under section 17 of the Act of 1882, when the trustee might get possession, or give alternative accommodation, or let the wife stay and pay so much?]

That right is seldom conceded to the trustee. If section 17 does not help, section 38 (*b*) of the Bankruptcy Act might help, for under it the court might consider all the interests involved.

[ROMER L.J. But you could not have this claim determined in the bankruptcy court unless the wife had claimed the house.]

The husband himself could be compelled to apply, and then to comply with any order made. The least suitable forum is a common law action for possession, which means that the wife can be turned out at once with no opportunity for the court to consider her special interests.

Heathcote-Williams Q.C. and *G. F. I. Sunderland* for the trustee in bankruptcy. The deserted wife's right to remain in the house is a personal privilege which does not attach to the land: see *Thompson* v. *Earthy.*[17] It is not an equity affecting the trustee, but a personal disability of the husband. The cases referred to are irrelevant, for in none of them was the wife's special position in the matrimonial home of any value to her. Her possession was that of her husband; her rights are incidental to the matrimonial status: see *Middleton* v. *Baldock.*[18] No contract is alleged here; but if she is a licensee under a contract of some sort, is it suggested that she is to have the house for the rest of her matrimonial life? That might result in the absurd situation that, if the husband went back to live in the house, the wife could tell his creditors that she had an irrevocable licence to remain.

[SOMERVELL L.J. My difficulty in limine is that an action of ejectment is an action in tort based on a proprietary right, which the husband cannot bring against his wife. How can the trustee do what the husband cannot do? Even if he can, is that the right procedure?]

[17] [1951] 2 K.B. 596.

[18] [1950] 1 K.B. 657.

The freehold interest became vested in the trustee under section 1 of the Bankruptcy Act, 1914. The husband lost his right to possession under section 22 (4). The wife's right affects the enjoyment of the husband's property only so long as it is his; it does not affect a stranger to the matrimonial status.

[ROMER L.J. But it is not a right in gross. If the bankrupt's property is subject to some disposition in favour of somebody else, the right to possession is also subject to that disposition.]

[DENNING L.J. If you have a contractual licence with no interest in the land, like "the front of the house" rights in a theatre, and the landlord goes bankrupt, do you say that the trustee is not bound by that licence?]

No. The trustee accepts the contract. But there is no authority for the proposition that a wife has any right which vests in her independently of her husband's right. It is a personal right.

[DENNING L.J. But in a way a contractual licence is personal too.]

[ROMER L.J. The trustee in bankruptcy gets no better title than the debtor. But if you say that the freehold vests in the trustee free of the licence and that it is not necessary to apply under section 17, then the trustee gets a better title than the debtor.]

A contractual licence is a legal right known to the law, which affects a person who acquires a title to the land.

[ROMER L.J. But a wife's right is also known to the law.]

Only so long as it is a licence vested in her husband. The Married Women's Property Act, 1882, is limited to the matrimonial relationship.

[SOMERVELL L.J. It is curious that the point has not arisen before. The conflict in claims as between the Act of 1882 and the Bankruptcy Act ought to be cleared up. It is, I think, a very important part of the argument to consider what alternative steps there are, and it might help you if we were satisfied that there was no satisfactory procedure under section 17.]

Only specific persons can take advantage of that procedure: see section 17 itself. The trustee could not employ that section.

[DENNING L.J. I am not so sure about that. It may be difficult, but as in the old days an assignee could sue in the assignor's name, so perhaps the trustee could use his own or the husband's name. Or possibly section 38 (*b*) of the Bankruptcy Act allows the trustee to proceed in his own or the husband's name.]

But section 17 is between husband and wife. Here the issue is between trustee and wife. It would be unreal to make the husband say there was an issue between him and his wife, and the House of Lords has indicated that it does not allow for nominal parties.

[DENNING L.J. Does section 105 (1) of the Bankruptcy Act provide a possible procedure? There is jurisdiction there over strangers. The question is whether the trustee has a higher right than a husband and can bring an action of ejectment, or whether the solution is an application to a court which has a discretion.]

Once the husband's rights were determined, the house ceased to be the matrimonial home. The plainest possible words would be required in any statute to show that the wife had any statutory right over or in respect of property independently of her husband: see Halsbury, Vol. II, 2nd ed., at p. 107, citing *In re Burgoyne; Ex parte Burgoyne*,[19] where it was held that the debtor might be committed for refusing to deliver up possession of property formerly belonging to him which the official receiver had sold to a purchaser.

[SOMERVELL L.J. But the possession rights here have been divided. The husband's right to dispose of the property is fettered. That fetter does not disappear simply by vesting it in the trustee.]

All that section 17 does is to give the wife enjoyment of her husband's property, and when it ceases to be his, her right ceases too.

Muir Hunter in reply. The case is of major importance from the point of view of the deserted wife's position. She has a licence which is revocable only by order of the court.

[SOMERVELL L.J. Her right may be greater than a licence. If you are right and the trustee cannot revoke the licence, what is the proper procedure for marrying the Act of 1882, s. 17, and the Bankruptcy Act of 1914?]

The trustee should apply to the court in bankruptcy or under the Act of 1882—it is convenient that it is the same court—and ask that the wife's position should be assessed, having regard (a) to the fact that the husband's interest needs to be sold for the benefit of the creditors, and (b) that the wife was entitled to maintenance for which she could not prove, so that she could not compete with the creditors for his assets other than his current earnings, and would get no part of the value of the house in which, prior to the bankruptcy, she had some proprietary right. The court would then have discretionary power to make an order for possession, or some other order, as, for example, that the wife could rent the house.

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[19] (1891) 8 Morr. 139.

[SOMERVELL L.J. Do you suggest that the application should be made under section 105 (1) of the Bankruptcy Act, 1914, which takes a number of matters into account, or should the trustee apply in his own or the husband's name under section 17?]

It is not clear that he could apply under his own name, but the bankrupt could be compelled to place his matrimonial property before the court at the instance of the trustee under section 38 (*b*), and the court could order the trustee to determine the issue as a judge would in a matter which came before him under section 17 of the Act of 1882.

[SOMERVELL L.J. Our answer may depend on the view we take of the procedural position. One view is that the trustee gets nothing more than the husband had, so that no action of ejectment could be brought, and no legal proceedings save under section 17; and in that case somehow that section must be invoked. The other is that if prima facie a trustee can call on a husband to deliver his property on the principles laid down in the Rent Act cases, the wife would have no remedy. This does raise a question of public interest. It impinges on a branch of the law which is of great importance; it seems to me that a trustee ought to exercise his rights only when he has proceeded by motion and obtained the sanction of the court to his action.]

Those two views are adopted as the principal pillars of the argument. The submissions for the appellant are confined to the case of the deserted wife. So long as she lives with her husband she is a co-adventurer; but once she is cast out she has special rights and is entitled to have them protected.

Cur. adv. vult.

May 4. SOMERVELL L.J. I agree with the judgment which my brother Romer will deliver and the reasons given in that judgment for allowing the appeal, and I have nothing which I wish to add to it.

DENNING L.J. This case raises important questions about the right of a deserted wife to stay in the matrimonial home.

[His Lordship stated the facts and continued:] The first question on the facts is whether the wife has any right of her own to stay in the house. Under the old common law as it existed until 70 years ago she had no rights at all apart from those of her husband. She was treated by the law more like a piece of his furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street, and so he could his wife. The law did not say him nay. It merely gave the wife authority to pledge his credit for necessaries. If her husband turned her out, she had to go and find lodgings elsewhere, pledging his credit for the rent, that is, if she could find anyone to trust to his credit. She could not in those days get an order for maintenance against her husband. She had to find someone who would take her in out of pity or charity or on the husband's credit. She could not pledge her own credit for she could not make a contract. Even if the husband did not turn her out, nevertheless when he ceased for any reason to be entitled to the house she would have to leave it: for she had no right of her own to stay there. Thus, if the husband became bankrupt his assignees in bankruptcy could turn her out just as they could his furniture.

All that has changed now. A wife is no longer her husband's chattel. She is beginning to be regarded by the law as a partner in all affairs which are their common concern. Thus the husband can no longer turn her out of the matrimonial home. She has as much right as he to stay there even though the house does stand in his name. This has only been decided in the last 10 years. It started in 1942 when Goddard L.J. said that the husband's only way of getting his wife out of the house was to make an application under section 17 of the Married Women's Property Act, 1882: see *Bramwell* v. *Bramwell*.[20] That section gives the court a very wide discretion in the matter; and accordingly, in 1947, when a husband claimed that he had an absolute right to turn his wife out, it was held that he had no such right, but that it was a matter for the discretion of the court: see *H.* v. *H.*[21] Very shortly afterwards, this court took the same view (*Stewart* v. *Stewart*[22]), and it is now settled law that a deserted wife has a right, as against her husband, to stay in the matrimonial home unless and until an order is made against her under section 17. In support of this right His Honour Judge Willes recently made an order allowing a wife to stay until the husband found alternative accommodation, and restraining the husband from selling the house over her head, and we affirmed it: *Lee* v. *Lee.*[23] Moreover it has been held that the wife's right is effective, not only as against her husband but also as against the landlord. Thus where a husband, who was statutory tenant of the matrimonial home, deserted his wife and left the house, it was held that the landlord could not turn her out so long as she paid the rent and performed the conditions of the tenancy. This right as against the landlord is a very special right on her part. She has to assert the right in her husband's name, but the husband cannot prevent her from exercising it. Even if he gives her notice to go, or purports to surrender the tenancy, or to submit to judgment, nevertheless she is entitled to stay: see *Old Gate Estates Ld.* v. *Alexander*[24]; *Middleton* v. *Baldock.*[25] Evershed M.R. put it succinctly and simply in these words[26]: "It seems to me that, as the wife of "the tenant—who had deserted her—this wife, beyond doubt, "was entitled to be in possession and to enjoy any right which "the tenant had under contract, statute, or otherwise, to live on "the premises." In short, she has a right of her own, derived no doubt from her husband, but still a right of her own to assert, on his behalf, the tenant right in the premises, no matter what her husband may say or do about it.

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[20] [1942] 1 K.B. 370, 374.

[21] (1947) 63 T.L.R. 645.

[22] [1948] 1 K.B. 507, 513.

What is the nature of this right of the deserted wife which the courts have thus evolved? It bears, I think, a very close resemblance to her right to pledge her husband's credit for necessaries. Under the old common law, when a husband deserted his wife, or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit for necessaries: *Boulton* v. *Prentice*,[27] quoted in the notes to *Manby* v. *Scott.*[28] One of the most obvious necessaries of a wife is a roof over her head; and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home, the wife should have an irrevocable authority to continue the tenancy on his credit; and that when he is the owner of it she should have an irrevocable authority to stay there. This authority, like the old one, is based on an irrebuttable presumption of law. The husband cannot revoke it except by order of the court under section 17 of the Act of 1882.

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[23] Post, 489.
[24] [1950] 1 K.B. 311.
[25] [1950] 1 K.B. 657.
[26] Ibid. 662.
[27] 1 Selw.N.P., 13th ed., 233.
[28] 2 Smith's Leading Cases, 13th ed., 456, 469.

In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct. It ceases when the marriage comes to an end by death or divorce (*Robson* v. *Headland* [29]), but it does not cease when there is a judicial separation: *H.* v. *H.*[30] The authority is, of course, purely personal to her. She alone can exercise it. She cannot assign it. It does not give her any legal interest in the land. She may perhaps sublet some of the rooms so as to help keep herself; but even then, she does so, not out of any legal interest of her own in the land but on the presumed authority of her husband. Her possession is not always exclusive. If the husband has only been guilty of desertion and nothing else, he is entitled to come back at any time asking to be forgiven, and she is then bound to receive him. She cannot then keep him out of his house. But if he has, in addition to desertion, been guilty of cruelty or adultery, she is not bound to take him back. She can keep him out of the house. Her possession may then be quite exclusive. But whether her possession is exclusive or not, there can be no doubt that she is not a tenant of her husband. She has only a personal privilege with no legal interest in the land and she is therefore only a licensee: see *Errington* v. *Errington and Woods.*[31] Her occupation is comparable with that of a contractual licensee, the only difference being that a contractual licence is revocable in accordance with the terms of the contract, whereas her licence is not revocable except by an order of the court. Sometimes her occupation is put by the parties on a contractual footing. Thus, when they are making the necessary arrangements consequent on desertion, the husband often agrees to let the wife live in the house until he has found her other accommodation; and she in return agrees to accept a lesser amount of maintenance on that account. That is what happened in *Cristel* v. *Cristel*[32]; *Thompson* v. *Earthy*[33]; and in the present case. When such arrangements are made, the wife's occupation does not rest on a presumed authority of the husband but on an express authority which is co-extensive with it. In any case, however, the position of the wife is that she is a licensee with a special right under which her husband cannot turn her out, except by an order of the court.

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[29] (1948) 64 T.L.R. 596.

[30] 63 T.L.R. 645.

[31] [1952] 1 K.B. 290.

Such being the nature of the wife's right, the next question is whether it is binding on the trustee in bankruptcy. It is not every right created by a man which binds his trustee in bankruptcy. Take a contract by him to sell goods. If the property in the goods has not passed to the buyer at the time of the receiving order the trustee is under no obligation to deliver the goods. The trustee takes the goods free of the contract. The buyer has only a right to prove for damages: see *In re Wait*,[34] *per* Atkin L.J. On the other hand, take a contract by which the man before the bankruptcy gave a lien on his goods to a repairer. The trustee in bankruptcy takes subject to the lien just as he takes subject to a right to stop in transitu. Into which category does the wife's right come? Is it a clog or fetter on the land itself like a lien, or is it a mere personal claim like her claim to maintenance? There is no authority on this point. I have had the advantage of reading the judgment of my brother Romer in which he holds that the trustee does take subject to the wife's right. I entirely agree with him, but for my own part I feel it necessary to go further and inquire what is the quality of the wife's right that it should lead to this result. I start with this: the wife's right is analogous to a contractual licence to occupy land. It is indeed so closely analogous that I think no valid distinction can be made between them. If a contractual licence is not binding on the trustee in bankruptcy but only gives rise to a right of proof, then I cannot think that the wife's right is binding on him, for it is of no higher quality; but if a contractual licence is binding on the trustee, like a lien, then I think the wife's right should also be binding on him.

We have recently held in this court that a contractual licence to occupy land is binding on the devisee of the licensor: see *Errington* v. *Errington and Woods*[35]; and it seems to follow that it is also binding on his trustee in bankruptcy. Mr. Heathcote-Williams did not indeed contend the contrary. I put to him the case where a licensor grants the "front of the house" rights in a theatre to a licensee who goes into occupation of the rights and then the licensor goes bankrupt, and he conceded that the trustee in bankruptcy would be bound by the licence. Reason and justice both demand that this should be so, and I would not have felt it necessary to pursue the matter further but for the fact that the decision in *Errington* v. *Errington and Woods* [35] was questioned before us in another case. I have therefore felt it necessary to reconsider the matter.

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[32] [1951] 2 K.B. 725.
[33] [1951] 2 K.B. 596.
[34] [1927] 1 Ch. 606, 637–40.
[35] [1952] 1 K.B. 290.

The objection that is made is that a contractual licence only gives rise to contractual obligations and not to any proprietary rights or interests, and that the burden of it does not therefore run with the land. In answer to this objection let me start with the common law. In the year 1618 and for over 200 years afterwards it was held that a contractual licence to use and occupy land, once it was acted on by entry into occupation, was binding not only on the licensor but also on his successors in title, and that it was not revocable except in accordance with the terms of the contract. If the licensor or his successor ejected the licensee or his goods in breach of the contract, he was liable in assault or trespass, as the case might be: see *Webb* v. *Paternoster*,[36] where a licence to stack hay was held binding on the successors of the licensor, including his tenants: *Wood* v. *Lake*,[37] where a parol licence to stack coals for seven years was held irrevocable except in accordance with the contract: *Tayler* v. *Waters*,[38] where a licence to enjoy beneficial privileges in the opera house was held not to be revocable at will; and *Wallis* v. *Harrison*,[39] where a licence to make and use a railway was held not binding on successors solely because it was still executory. Those cases were much considered in *Wood* v. *Leadbitter*,[40] and the only criticism directed at them was that the licence should have been under seal. It was agreed that the licence in *Wood* v. *Leadbitter* [41] and the other cases would have been good if they had been granted by deed. This is the very point at which the Judicature Acts come into play. Since the fusion of law and equity, there is no necessity for a seal. Every contractual licence to use and occupy land, once acted on by entry into occupation, takes effect according to its tenor. It is not revocable at will. It is only revocable in accordance with the terms of the contract. If the licensor should attempt to eject the licensee in breach of the contract he is guilty of an assault: *Hurst* v. *Picture Theatre Ld.*[42]; and if he should attempt to revoke the licence in breach of the contract the court of equity will grant an injunction to restrain him: *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*, *per* Lord Simon and *per* Lord Uthwatt.[43] This means that the law is restored to the position in which it was for 200 years before *Wood* v. *Leadbitter*[44] came to disturb it. The law is now just as that accomplished lawyer, Sir Vicary Gibbs C.J., stated it in 1816 in *Tayler* v. *Waters*,[45] when delivering the reserved judgment of the full Court of Common Pleas: "A "beneficial licence to be exercised upon land may be granted "without deed, and cannot be countermanded, at least after it "has been acted upon . . . and this is not such an interest in land "as, by the Statute of Frauds, can only pass by writing." It is not therefore an interest in property, but nevertheless once the licensee has entered into occupation it is, as Parke B. put it in *Wallis* v. *Harrison*,[46] "a sort of interest against the licensor and "his assigns," by which he meant, as I understand it, that it was a clog or fetter, like a lien, which is not an interest in property but only a personal right to retain possession: *Legg* v. *Evans*[47]; but nevertheless it is, of course, effective against the owner and his assigns.

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[35] [1952] 1 K.B. 290.
[36] (1618) Popham 151.
[37] (1751) Sayer 3.
[38] (1816) 7 Taunton 374.
[39] (1838) 4 M. & W. 538.
[40] (1845) 13 M. & W. 838.
[41] Ibid. 843, 847–8.

The truth is, I think, that the old common lawyers of the seventeenth and eighteenth centuries, without knowing it, applied to contractual licences some equitable principles which have since become well known. By dispensing with a seal when the licence had been acted on, they anticipated the doctrine of part performance. By enforcing the licence against the successors of the licensor they anticipated the doctrine of restrictive covenants. Indeed, in modern times equity lawyers have reached the same result as the old common lawyers, but they have done it in their own way.

Let me now therefore turn to equity. Every contractual licence imports a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant is binding on the successors in title of the licensor in the same way as is a restrictive covenant.

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[42] [1915] 1 K.B. 1.
[43] [1948] A.C. 173, 191, 202.
[44] 13 M. & W. 838.
[45] 7 Taunton 374, 384.
[46] 4 M. & W. 538, 544.
[47] (1840) 6 M. & W. 36, 42.

It does not run with the land so as to give a cause of action in damages for breach of contract against the successor; but it is binding in equity on the conscience of any successor who takes with notice of it. He cannot therefore eject the licensee in disregard of it. It is an equity within the words of Lord Cottenham L.C. in *Tulk* v. *Moxhay*,[48] when he said: "If an equity is "attached to the property by the owner, no one purchasing with "notice of that equity can stand in a different situation from the "person from whom he purchased." In that case a covenant to keep the garden of a London square in its then form was held binding on successors in title who took with notice of the covenant. Suppose now that there was a covenant not only to keep the square garden in its then form but also a covenant to allow the residents of the square to use it. This second covenant is nothing more nor less than a contractual licence to use the garden; but surely both covenants would be held binding on the successors in title. There is no reason in principle to distinguish between them, and there is direct authority in favour of it. Eight years after *Tulk* v. *Moxhay*[48] a case arose where the owners of a cemetery sold grave spaces to purchasers. These were only contractual licences to use the land for the purposes of burial; but Sir John Romilly M.R. held them to be binding on the successors in title of the licensors: see *Moreland* v. *Richardson*.[49] So also a covenant to permit work to be done on land has been held binding on successors who take with notice, because it imports a negative covenant not to interfere with the work: see *Andrew* v. *Aitken*,[50] *per* Fry J., and *Sharpe* v. *Durrant*,[51] where Warrington J. said: "This is a case where a person taking land, with "notice of an obligation entered into by the previous owner, will "be bound in equity to give effect to that obligation." These authorities fully support the proposition put forward by Sir John Salmond in his book on Torts that a contractual licence to enter on land "if of such a nature as to be specifically enforceable . . . "binds and runs with the land in equity so as to be enforceable "not merely against the grantor but also against all subsequent "owners and occupiers of the land except purchasers for value "without notice of any such equitable right" (7th ed., at p. 290).

Likewise, when the owner of goods agrees to allow another person to use them, as when he lets them out on hire, the agreement is binding not only on the original owner but also on his successors in title: *De Mattos* v. *Gibson*[52] and *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.*[53] I know that some people have looked askance at the principles laid down in the *Strathcona* case,[53] but there were, on the Board of the Privy Council, three of the most distinguished equity lawyers of the day, and I fail to see why we should not follow the principles there laid down, at any rate with regard to a contractual licence to use chattels, especially as they are so eminently just and reasonable.

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[48] 2 Phillips 774, 778.

[49] (1856) 22 Beav. 596; (1857) 24 Beav. 33.

[50] (1882) 22 Ch.D. 218, 220.

[51] (1911) 55 S.J. 423.

It is, of course, necessary in all these cases that the party who seeks to enforce the contract against a successor in title should have a sufficient interest to warrant the intervention of equity. He must, as the Privy Council put it, "have, and "continue to have, an interest in the subject-matter of the con-"tract": see the *Strathcona* case.[54] This does not mean that he must have a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient. Thus in the case of restrictive covenants made for the benefit of adjoining land, possession of that adjoining land is sufficient: see *London County Council* v. *Allen*,[55] *per* Scrutton L.J. In the case of contractual licences made for the benefit of the occupier of the land, actual occupation of that land is sufficient: see *Errington* v. *Errington and Woods*.[56] When a contractual licence to put up advertisements on a wall has been acted on by putting up the advertisements, it is binding on the successors in title of the licensor, including his tenants: see *In re Webb's Lease, Sandom* v. *Webb*,[57] *per* Sir Raymond Evershed M.R.[58] and Jenkins L.J.[59] But a right to put up advertisements on a wall, not yet built, is not binding on the successors in title because that is not itself a licence but only a contract to procure that a licence will be granted in the future: *King* v. *David Allen & Sons Billposting Ld.*[60] Likewise in the case of contractual licences to use chattels, entry into possession, once made, is sufficient, even though there has been a temporary lack of possession: the *Strathcona* case[61]; but an interest in price restriction is not sufficient: *Taddy & Co.* v. *Sterious & Co.*[62]

The only case which gives rise to any difficulty is *Clore* v. *Theatrical Properties Ld. and Westby & Co. Ld.*,[63] where the

[52] (1858) 4 De G. & J. 276.

[53] [1926] A.C. 108.

[54] Ibid. 121.

[55] [1914] 3 K.B. 642, 672.

[56] [1952] 1 K.B. 290.

[57] [1951] Ch. 808.

[58] Ibid. 821.

[59] Ibid. 832.

[60] [1916] 2 A.C. 54.

[61] [1926] A.C. 108.

[62] [1904] 1 Ch. 354.

[63] [1936] 3 All E.R. 483, 490.

licensee of the "front of the house rights" in a theatre, who was in occupation of them, was held to be unable to enforce them against an assignee of the licensor. That case, however, proceeds on the assumption that the licensee had no right which equity could enforce against the licensor. That assumption is no longer true: see *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*, *per* Lord Uthwatt[64]; and the case may some day have to be reconsidered accordingly.

In some contractual licences over land (not amounting to occupation) there may be some nice questions whether the licence is an equitable easement which must be registered in order to be binding on successors: see an illuminating note on "Equitable "Easements" by Mr. Geoffrey Cross in *The Bell Yard* (1935), No. 15, at p. 18; but no such questions arise where the licensee is in possession or actual occupation of the land, because that itself is sufficient notice of his rights: see section 14 of the Law of Property Act, 1925, and section 70 (1) (*g*) of the Land Registration Act, 1925, and *Lewisham Borough Council* v. *Maloney*.[65] Statutory tenants (who have only a personal privilege) and requisitioning authorities (who have only possession) do not have to register their interests; nor does a contractual licensee so long as he is in possession or actual occupation. His interest is, therefore, binding on a trustee in bankruptcy, even though the trustee does rank as a purchaser for value: see section 43 of the Land Registration Act, 1925. I have thus shown, I hope, that equity has reached the same result as did the old common lawyers.

My conclusion, therefore, is that a contractual licensee, who is in actual occupation of land by virtue of the licence, has an interest which is valid, if not at law at any rate in equity, against the successors in title of the licensor, including therein his trustee in bankruptcy. It is not a legal interest in land, like a tenancy, but a clog or fetter like a lien. It is a personal right, but it is nevertheless binding on successors of the licensor, so long as the conditions of the licence are observed.

The third and last question is whether a deserted wife is in the same position as a contractual licensee. It has been suggested that the husband's right to apply under section 17 for possession is personal to the husband and does not extend to his successor. Hence it is said that the successor must be able to sue at law for possession because it is inconceivable that he should have no

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[64] [1948] A.C. 173, 202.

[65] [1948] 1 K.B. 50.

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means of getting her out. That was the argument which prevailed with Roxburgh J. in *Thompson* v. *Earthy*[66] and with the county court judge in the present case. It seems to me, however, that one answer to it may be this: Although an application under section 17 has to be made in the husband's name, nevertheless a successor in title can compel the husband to allow his name to be used for the purpose. If the husband sells the house, there is an implied assignment by the husband of his right to obtain possession; and equity has always compelled an assignor to allow an action to be brought in his name. So, if the husband becomes bankrupt, the trustee can compel the husband to allow his name to be used for an application under section 17: see sections 22 (3) and 38 (*b*) of the Bankruptcy Act, 1914. Alternatively, the trustee in bankruptcy can make an application under section 105 for an order that the wife do give up possession. In either case the court which deals with the application is enabled under the relevant section to do whatever is just. I must say, however, that even if a successor cannot compel the husband to apply under section 17, but has himself to bring an action at law, nevertheless I should have thought the court would have a discretion whether to order possession or not, for that is the only way in which effect can be given to the wife's right as now established. Any other view would lead to great injustice. It would mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilized community could tolerate such a cynical disregard of the married state. Equity demands that the successor in title should be in no better position than the husband.

The result of the whole case is that the wife's right to stay in the matrimonial home does not come to an end automatically on the husband's bankruptcy. The trustee in bankruptcy takes subject to equities. He takes therefore subject to her right, for it is an equity. The trustee must apply to the court for possession, and the judge who hears the case will take into account the various competing interests. He will have regard to the fact that, so far as existing assets are concerned, the general body of creditors have a substantial priority over the wife because they can prove for the debts due to them, but she cannot prove for arrears of maintenance due to her. He will also remember that, so far as the bankrupt's personal earnings are concerned, the wife

[66] [1951] 2 K.B. 596.

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has a substantial priority over the creditors because the bankrupt has to support his wife and children out of his earnings before any of it goes to the creditors. If she is allowed to stay in the matrimonial home she gets less maintenance, and the creditors get more out of his personal earnings. But if she is turned out of the matrimonial home she will be entitled to more maintenance out of his earnings and there will be less available for the creditors. In these circumstances the justice of the case may often be met by allowing the wife to stay in the house temporarily until she finds alternative accommodation and the court can make appropriate orders to that end.

In the present action the trustee claims that in point of law as soon as the husband became bankrupt the wife became a trespasser and liable for mesne profits. I do not think the claim is well founded. The wife has an equitable right to stay which is binding on the trustee in bankruptcy. He has no absolute right to eject her. It is a matter for the discretion of the court.

In my opinion the appeal should succeed and judgment be entered for the wife.

ROMER L.J. stated the facts and continued:—The position of a deserted wife who is left by her husband in occupation of the matrimonial home has been considered by the courts lately on a number of occasions. In the recent case of *Errington* v. *Errington and Woods* [67] my brother Denning, in referring to some of these authorities, said [68]: "There are numerous cases where a "wife, who has been deserted by her husband and left by him "in the matrimonial home, has been held to be not a tenant of "the husband owner, . . . nor a bare licensee, . . . but to be in "a special position—a licensee with a special right—under which "the husband cannot turn her out except by an order of the "court." I respectfully adopt this as a correct statement of the position of such a wife. She has no legal or equitable interest in the home which she continues to occupy, and in that respect is in no better position than any other licensee. On the other hand, her husband, the licensor, cannot bring proceedings against her in ejectment, for the status of matrimony prevents it. He accordingly cannot effectively revoke her licence, and in this respect the wife is in a more favourable position than that of an ordinary licensee. The question is (and it is, I think, a difficult one) whether the special protection which a wife enjoys against

[67] [1952] 1 K.B. 290.

[68] Ibid. 298.

ejectment at the instance of her husband avails her against similar action by the husband's trustee in bankruptcy. The plaintiff in the present case argues that it does not, and he says that the wife is trying to create in favour of herself a novel species of interest in property, or a new kind of equity, such as the court refused to recognize in *Thompson* v. *Earthy*.[69] It is common ground that, when the debtor was adjudicated bankrupt, the whole of his property (with certain irrelevant exceptions) vested in his trustee in bankruptcy and became divisible among his creditors: Bankruptcy Act, 1914, ss. 18 (1) and 38. "Property" is defined by section 167 of the Act, and undoubtedly included the husband's equity of redemption in the matrimonial home. It is also common ground that in general the trustee takes no better title to the property than the bankrupt had, and he takes subject to the same equities as affected the property in the bankrupt's hands. My brother Denning in his judgment has dealt with the latter principle, and has expressed the view that the right which the deserted wife enjoyed at the date of her husband's bankruptcy constituted an enforceable equity, which operated as a bar to the plaintiff's claim in these proceedings. The same result is arrived at, I think, by approaching the question from a somewhat different angle, and I will confine my observations to that approach.

The debtor's right of dealing with the property was subject to the clog or fetter that the house had an occupant whom he could not, of his own volition, eject, and there was accordingly to this extent a restriction on his beneficial ownership of the property. If the trustee after the bankruptcy could sue the wife for possession, it could only be on the footing that the property vested in him free from this restriction, and it would follow from this that he acquired a larger beneficial interest in the property than that which the debtor had previously enjoyed. It would also follow that a third person automatically lost a special feature attaching to a licence which the debtor had granted for value, and was relegated to the position of an ordinary licensee; and that the deterioration of that person's position and the improvement of the trustee's would be commensurate in relation to each other.

Mr. Heathcote-Williams argued before us for the plaintiff that these were the necessary and natural results of the bankruptcy law. What is vested in the trustee, he said, was the freehold of the property, and (apart from the mortgagee) nobody but the debtor had any legal or equitable interest in that property. The wife's licence depended on her husband's ownership of the property and could not survive the vesting thereof in the trustee. This vesting carried with it (under section 22 of the Bankruptcy Act) the right to possession, and the passing of that right was destructive of licences that had been previously granted by the debtor. In this connexion Mr. Heathcote-Williams relied on a principle which has been recognized in *Brown* v. *Draper* [70] and other cases, namely, that a wife cannot claim the benefit of her husband's statutory tenancy after his interest as statutory tenant has been validly determined. That, of course, is true; every subordinate interest must perish with the superior interest on which it is dependent. The argument, however, does not appear to me to be convincing. The superior interest in the present case was the ownership of the house, and that has not been extinguished; it is still alive and is vested in the trustee. The real point, as I see it, is whether it became so vested subject to, or free from, a particular incident which was attached to it in the debtor's hands prior to the vesting. If it is now free from the bankrupt's disability to sue the wife for possession, the plaintiff's action must succeed. This view, however, seems to me to involve a departure from the general rule to which I have already referred, that a trustee takes no better title to property than the bankrupt had. This rule is fully and (I think) accurately stated in Halsbury's Laws of England, Vol. II, 2nd ed., at p. 209, as follows: "The property of the bankrupt passes to the trustee in the same "plight and condition in which it was in the bankrupt's hands, "and is subject to all the equities and liabilities which affected it "in the bankrupt's hands, and to all dispositions which have been "validly made by the bankrupt, and to all rights which have "been validly acquired by third persons at the commencement "of the bankruptcy, unless the property which the trustee takes "is released by some express provision of the bankruptcy law." Examples of such provisions are those relating to fraudulent conveyances and preferences. A licence of the special character which the debtor in the present case created in favour of his wife appears to me to be, at all events by analogy, prima facie within the general principle as above stated, and I can see no sufficient reason for excluding such a licence from it. In my opinion, accordingly, the trustee is no more entitled than was the debtor before his bankruptcy to revoke the wife's licence on his own authority and to sue her for possession of the property. It is said that, if the wife's right to possession is binding on the trustee, then the title of the latter to the property is not only not better than that which the debtor had had, but is worse, because he cannot, as the husband could have done, apply to the court for possession under section 17 of the Married Women's Property Act, 1882, with the result that the wife can remain in the house without paying rent and without any fear of being dispossessed. As to this, Mr. Muir Hunter for the defendant suggested that an application under section 17 could still be made either by the husband on the compulsion of the trustee or by the trustee himself by virtue of section 38 (*b*) of the Bankruptcy Act, 1914, the debtor himself being made a party to the application. I doubt this. Section 17 provides in effect that on the application of either a husband or wife, the court may, in any question that arises between them, make orders as to the title to or possession of property. Theoretically the trustee might be able to compel the husband to apply: see section 22 (2), Bankruptcy Act; but, apart from the unsatisfactory nature of such a procedure, the application could scarcely be regarded as one made in a question between husband and wife, for the issue would in substance be between the husband's creditors on the one hand and the wife on the other. This comment would be equally true of an application made by the trustee in bankruptcy and, further, such an application would not be by the husband, even though he were made a party to it. I confess, accordingly, that I entertain some doubt whether the jurisdiction of the court under section 17 could be invoked. On the other hand, if the defendant were to persist in remaining in possession without payment of rent, or if no other arrangement agreeable both to her and to the trustee can be arrived at, I see no reason why the matter should not be resolved in the bankruptcy proceedings under section 105 (1) of the Bankruptcy Act. It is well settled that under that provision the bankruptcy court has power to determine questions affecting persons who are not parties to the bankruptcy and, in my opinion, it would be well within the powers of the court, on a motion by the trustee, to decide whether the defendant should be permitted to remain in occupation of what was the matrimonial home, and, if so, on what terms, or whether she should be required to deliver up possession. On such an application the court would doubtless take into account all the matters that would be relevant to the exercise of the discretion conferred by section 17 of the Married Women's Property Act—and in particular the fact that the wife cannot prove in the bankruptcy for payments due under the maintenance order and that the magistrates in making that order almost certainly regarded the wife's right to occupy the house as relevant to the amount which they directed her husband to pay. If, as I believe, the matter could be dealt with in this way, the wife's position in relation to the property would be substantially the same as it was before her husband's bankruptcy, and the trustee would in effect succeed to the position of the debtor.

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[69] [1951] 2 K.B. 596.

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[70] [1944] K.B. 309.

For the reasons that I have tried to express I am unable to agree with the judge that the trustee was competent to sue the defendant for possession, and accordingly this appeal, in my judgment, should be allowed.

Appeal allowed.
Leave to appeal refused.

Solicitors: *T. D. Jones & Co., for Lyon Clark & Co., Smethwick; Bentleys, Stokes & Lowless, for Turner, Bayley & Co., Dudley.*

NOTE.

LEE *v.* LEE.

C. A.
1952
Feb. 12.
Somervell and Denning L.JJ. and Roxburgh J.

Husband and Wife—Matrimonial home possessed by husband—Right of wife to reside therein—Husband restrained from selling house until provision of alternative accommodation—Jurisdiction of county court judge—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Under section 17 of the Married Women's Property Act, 1882, a county court judge has jurisdiction to protect a deserted wife and her children in the occupation of the matrimonial home, by making an order restraining the husband from selling or assigning any right, title or interest which he had in the property, or by any other act creating any right in any other person to evict the wife or in any way interfering with her residence therein, until he had provided reasonably suitable alternative accommodation.

APPEAL from Judge Willes, sitting at Alfreton county court.

The parties were married in November, 1937, and thereafter lived together in a house known as "Timberscombe," of which the husband owned the freehold. On September 2, 1948, the husband left the matrimonial home. In October, 1948, proceedings were taken before justices

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by the wife against the husband, and by consent an order was made by which the husband agreed to pay £4 a week for the maintenance of the wife and the three children of the marriage and also agreed to grant to the wife a lease for two years of "Timberscombe" at a rent of 1s. a year, if demanded. In December, 1950, the husband sought to recover possession of the house by proceedings against the wife before the justices, but was unsuccessful. In 1951, being in financial difficulties, he secured to his bank an overdraft of £1,500 by a charge on "Timberscombe," and on April 5 of that year the wife applied to the county court under section 17 of the Married Women's Property Act, 1882,[1] for an order that the husband be restrained from entering into any contract for the sale or conveyance of the property which might interfere with her enjoyment of it. The county court judge made the following order: "I direct and order Hubert Arthur Lee until further or other order "varying this order is made by this court, to permit his wife . . . and "her three children to reside in and occupy 'Timberscombe' as the "matrimonial home of the [wife] and the [husband] and unless and "until he shall first have provided reasonably suitable alternative "accommodation as a matrimonial home for his wife and children. I "order and direct that Hubert Arthur Lee shall take no step by sale "or assignment of any right, title or interest which he now has in the "said property, or by any other act whatsoever create any right, title "or interest in any other person to evict his wife and children or any "of them from the matrimonial home or in any way interfere with their "residence therein."

The husband appealed.

A. P. Fletcher for the husband.
Mitchison Q.C. and *Morgan Blake* for the wife.

SOMERVELL L.J. In *Thompson* v. *Earthy* [2] a deserted wife and her two children lived in the matrimonial home, which was the husband's property, in fulfilment of the husband's undertaking, given to the justices, that the wife should be permitted to live there rent free. In breach of that undertaking the husband sold the house to a purchaser who claimed, and, as Roxburgh J. held, was entitled to, possession. In consequence, the undertaking given by the husband to the justices was of no effect and the wife was ejected. That decision may be the reason why the county court judge in the present case made the order in the terms which he did.

Counsel for the husband contended that the county court judge had no jurisdiction to make the order. It seems plain to me that he had jurisdiction. Counsel submitted that although the words of section 17 are discretionary, one ought not to regard that discretion as exercisable on a question of title. He agreed that sometimes there might be an obscurity or a dispute as to title. An illustration, suggested by one of my brethren, was that there may be wedding presents and it is uncertain which belong to the husband and which to the wife, and in such a case the court is free to cut the Gordian knot in a way which seems reasonably fair, without going into long investigations. I am inclined to agree with counsel to this extent—and this is clearly what Sir Boyd Merriman P. had in mind in *Kelner* v. *Kelner*,[3] on which counsel for the husband relied—that if the question is one of title only, it has, of course, to be decided according to law, but if the question is whether A or B owns a piece of jewellery or whatever it may be, section 17 confers on the court a wide discretion, although that does not mean that the question can be decided in some arbitrary manner and that the husband should be given some article, which is manifestly the wife's, because the wife has behaved badly. If the question is one of title it must be decided, so far as possible, according to evidence regarding the ownership of the property. But that does not seem to me to be this case. The county court judge has accepted the position that the title is the husband's.

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[1] Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as to "the title to or possession of property, either party . . . may apply "by summons or otherwise in a "summary way to any judge of the "High Court of Justice in England ". . . or . . . in England to the "judge of the county court of the "district . . . and the judge of the "High Court of Justice or of the "county court . . . may make such "order with respect to the property "in dispute . . . as he shall think "fit. . . ."

[2] [1951] 2 K.B. 596.

It is said by counsel for the husband, however, that his proposition is wider than that which I have accepted, and that under the section there is no jurisdiction to interfere with the exercise of proprietary rights, though he admits that the court can make an order dealing with possession, which is a proprietary right and often the most important one. The jurisdiction to do that is plainly shown in *Stewart* v. *Stewart*,[4] a decision of this court. In that case the county court judge had made an order the effect of which was that the wife had to vacate the premises, and the question was whether he had jurisdiction to do this. Tucker L.J., with whom Bucknill L.J. and Roxburgh J. agreed, said[5]: "It was pressed upon the judge that, in the particular circum- "stances of this case, he should not make an order for possession except "on the terms that it was not to take effect unless and until the husband "had provided other accommodation elsewhere for the wife. That is an "order which he might very well have made, but I find it impossible "to say that, in refusing to make an order in that particular form, he "was not exercising his discretion in a judicial manner." That is plain authority—and I think it has been accepted for a long time—that under section 17 the court can protect the possession of the wife—in this case the wife and children—and can make an order in the terms to which Tucker L.J. referred. If the court can do that it follows that it must be able to make the consequential restriction on the husband's rights so that he cannot, as happened in *Thompson* v. *Earthy*,[6] make the order a nullity, of no effect, by selling or transferring the property without any stipulation as to his wife's possession. Therefore I would be exceedingly unwilling to come to the conclusion that the county court judge could not do what he did in the present case. So far from there being anything in the statute to preclude him from doing what he has done, the words of the statute are in the widest possible form. The court

[3] [1939] P. 411.
[4] [1948] 1 K.B. 507.
[5] Ibid. 514.
[6] [1951] 2 K.B. 596.

can make such order with respect to the title to or possession of the property in dispute as it thinks fit.

The judge made a careful and full review of the authorities and came to the conclusion that there was no case directly in point, though there were orders which went some way to support the conclusion to which he came. He said that if there was no authority he considered it his duty to make a precedent, and in the exercise of his discretion he made the order to which I have referred. In my opinion there was jurisdiction for him to make that order, it was a proper order on the evidence before him, and the appeal must be dismissed.

DENNING L.J. The judge made this order so as to prevent the husband from selling the house over his wife's head, as the husband did in *Thompson* v. *Earthy*.[6] If the husband sells the house over his wife's head and a purchaser buys it in good faith for value, without notice of any right or interest in the wife, the purchaser can eject the wife. To forestall that danger in the present case the judge made an order restraining the husband from disposing of the house to the prejudice of his wife. I think he had ample jurisdiction to make that order. The words of section 17 of the Act of 1882 are quite wide enough for the purpose. I do not suggest that the judge could have made an order transferring the title in the house to the wife, but he certainly had jurisdiction to protect her in her occupation of it, even to the extent of preventing the husband from disposing of it. The order confirms and protects her special right as a deserted wife to stay in the matrimonial home—a right which has been repeatedly recognized in this court. It seems to me that if a purchaser should buy with notice of that right, or, at any rate with notice of the order, he could not, in disregard of it, eject the wife: see *Errington* v. *Errington*.[7] I agree, therefore, that the appeal should be dismissed.

ROXBURGH J. I agree that the judge had jurisdiction to make the order and that the order was properly made, and, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Cunliffe & Airy, for Walker, Terry & Wilson, Belper; Field, Roscoe & Co. for Ellis, Fermor & Shephard, Ripley.*

A. W. G.

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[6] [1951] 2 K.B. 596.

[7] [1952] 1 K.B. 290.

TAYLOR (FORMERLY RYAN) *v.* CHELTENHAM AND HEREFORD BREWERIES LD.

[1950 R. 2690]

C. A.

1952
Apr. 7, 8.

Somervell.
Denning and
Romer L.JJ.

Practice and procedure—Payment out of court—Money recovered by "widow of person killed"—Remarriage of widow—Application for payment out—Continuance of court's discretionary control of fund—R.S.C., Ord. 22, *r.* 14 (3) (9)—*County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 164).

The widow of a workman who met with a fatal accident while working for the respondents, sued the respondents for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The action was settled on the terms, inter alia, that £2,000, part of the total sum agreed, should be paid into the High Court for the widow's benefit, the apportionment being made under the Fatal Accidents Act, 1846, s. 2. That sum was duly paid into court.

Later, the widow remarried, and an application was made on her behalf to the master that the whole sum be paid out to her as of right on the ground that she had remarried.

The master refused the application, on the ground that the discretionary control over the fund conferred on the court by Ord. 22, r. 14 (3) and (9) of the Rules of the Supreme Court, had not ceased to apply to the case by reason only of the remarriage of the widow. The widow appealed, and Donovan J. affirmed the master and refused the application.

On appeal:—

Held, that where money has been recovered under the Fatal Accidents Acts, 1846 to 1908, by the widow of the person killed, the discretionary control over the money which the court exercises under the Rules of the Supreme Court does not come to an end when the widow remarries. The object of the court's control is the protection of the fund paid into court for the benefit of the particular person, and the words in Ord. 22, r. 14 (9) describing her as " the widow of the person killed " are words of identification only, and cannot be construed as creating a new kind of legal disability, comparable to infancy and unsoundness of mind, which would be removable on her remarriage.

Per Somervell L.J.: Though the wording is somewhat different, the effect of the provisions as to infants, persons of unsound mind, and widows, in the County Courts Act, 1934, s. 164, is the same as the effect of those provisions in Ord. 22, r. 14.

Johnston v. *Henry Liston & Co.* [1920] 1 K.B. 99 distinguished.

Dictum of Morton L.J. in *In re Embleton* [1947] K.B. 142, 146 disapproved.

Hamar v. *Cunard White Star Ld., The Queen Mary* [1952] P. 148 overruled.

Decision of Donovan J. affirmed.

[Reported by Miss M. M. Hill, Barrister-at-Law.]

APPEAL from Donovan J.

On November 2, 1950, Mrs. Winifred May Ryan (now Taylor) brought an action against her deceased husband's employers, the Cheltenham and Hereford Breweries Ld., under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, claiming damages in respect of his accidental death while in their employment. The action was settled on terms, the relevant term being as follows: "That the defendants "do within 14 days pay into court the sum of £2,850, such sum "to be invested in 3½ per cent. War Stock for the benefit of "Joan Ryan the infant daughter of the plaintiff as to £350 and "of Graham Ryan the infant son of the plaintiff as to £500 and "of the plaintiff as to £2,000, the dividends of all three funds to "accumulate."

A further sum under the Act of 1934 was paid out to the widow, and the £2,000 was paid into the High Court, the apportionment being made in accordance with section 2 of the Fatal Accidents Act, 1846.[1]

On September 29, 1951, the widow remarried, and an application was made on her behalf to Master Burnand, who was in charge of the £2,000, for payment out on the ground of her remarriage. The secretary to the master replied to her solicitors as follows: "Your application on behalf of Mrs. Taylor (formerly "Ryan) is that an order shall be made for payment out of court "to her of the whole of her fund on the sole ground that she has "remarried since the order was made on March 15, 1951, and "that the court has no longer any discretion with regard to the "fund. Master Burnand has directed me to state that he is "unable to accept your view that the court no longer has a discre"tion in the matter. He cannot make an order for the payment "out on the grounds only of the remarriage. Order 22, r. 14 (3) "and (9) of the Rules of the Supreme Court make it necessary "for the court to control the dealings with the fund of 'the widow "'of the person killed.' If 'the widow of the person killed' "recovers money under the Fatal Accidents Acts, 1846 to 1908,

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[1] The Fatal Accidents Act, 1846, s. 2: "Every such action shall be "for the benefit of the wife, husband, "parent and child of the person whose "death shall have been so caused, "and shall be brought by and in the "name of the executor or administrator of the person deceased, and in "every such action the jury may give "such damages as they may think "proportioned to the injury resulting "from such death to the parties respectively for whom and for whose "benefit such action shall be brought; "and the amount so recovered, after "deducting the costs not recovered "from the defendant, shall be divided "amongst the before-mentioned parties in such shares as the jury by "their verdict shall find and direct."

"she does not cease to have been 'the widow of the person killed' "by reason of her having become the wife of another man. By "remarriage she changes her status from widow to married woman "but she remains 'the widow of the person killed' who recovered "money under the Fatal Accidents Acts. If Mrs. Taylor desires "on good ground to have an order made for payment out of the "whole or part of her fund, the master will consider the grounds "on which such an application is made and so exercise the "discretion given to the court by Order 22, r. 14 (3)."

The applicant appealed against this refusal, and on February 28, 1952, Donovan J. affirmed the decision of the master, on the grounds that the provisions of the County Courts Act, 1934, s. 164,[2] as applied by Order 22, r. 14,[3] to funds in the

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[2] County Courts Act, 1934, s. 164: "(1) Where in any cause or matter "in the King's Bench Division of the "High Court, or in an admiralty "action in the Probate, Divorce and "Admiralty Division of that Court, "money is in any manner recovered "by or on behalf of, or adjudged or "ordered to be paid to or for the "benefit of, a person who is an infant "or of unsound mind, the High Court "or a judge thereof may order the "money or any part thereof to be "paid into or transferred to the "county court of the district in which "that person resides or such other "county court as the High Court or "judge may order.

"(2) On the making of any such "order, the money or the part thereof "to which the order relates shall be "paid or transferred according to the "order, and shall, subject to any "special order or direction of the "High Court or a judge thereof, and "to county court rules and to the "County Court Funds Rules, or the "Mayor's and City of London Court "Funds Rules, as the case may be, "be invested, applied or otherwise "dealt with for the benefit of the "person to whom the order relates in "such manner as the county court in "its discretion thinks fit.

"(3) The provisions of this section "shall apply to money which in pro"ceedings under the Fatal Accidents "Acts, 1846 to 1908, is recovered by "or adjudged or ordered to be paid "to the widow of the person killed as "they apply to money recovered by or "adjudged or ordered to be paid to an "infant."

[3] R.S.C., Ord. 22, r. 14: "(1) In "any cause or matter in the King's "Bench Division and in any ad"miralty action in the Probate, "Divorce and Admiralty Division in "which money or damages is or are "claimed by or on behalf of an infant "or a person of unsound mind suing "either alone or in conjunction with "other parties, no settlement or com"promise or payment or acceptance "of money paid into court, whether "before or at or after the trial, shall "as regards the claims of any such "infant or person of unsound mind "be valid without the approval of the "court or a judge.

"(2) No money (which expression "for the purposes of this rule in"cludes damages) in any way re"covered or adjudged or ordered or "awarded or agreed to be paid in any "such cause or matter in respect of "the claims of any such infant or "person of unsound mind, whether "by verdict or by settlement, com"promise payment, payment into "court or otherwise, before or at or "after the trial, shall be paid to the "plaintiff or to the next friend of the "plaintiff or to the plaintiff's solicitor "unless the court or a judge shall so "direct.

"(3) All money so recovered or "adjudged or ordered or awarded or

High Court, as to "money . . . recovered by, or adjudged, or "ordered to be paid to the widow of the person killed" were an adjectival expression simply identifying the money.

The applicant appealed.

J. P. Ashworth (for the Attorney-General) as amicus curiae. The Fatal Accidents Act, 1846, and amending Acts, which rendered persons whose wrongful acts had caused the death of another liable to pay compensation for the benefit of certain relations, did not provide for control of the money. By 1925 it was realized that widows, like infants, needed some protection, and the Judicature Act, 1925, s. 205 (2), gave the court power to control money recovered by a widow. That section was replaced by section 164 of the County Courts Act, 1934. In those statutory enactments and in R.S.C., Ord. 22, r. 14, widows and infants are treated slightly differently. By rule 14 (1), for instance, no compromise of an infant's action is valid unless the court approves it; there is no such limitation on a widow's claim; again, rule 14 (9) uses different language for the widow and the infant.

An infant is a person under a legal disability, and the court controls both (a) what money he shall get, and (b) what he shall do with it. A widow is not under any legal disability; but the Act and the rules, which apply here, provide that the court shall control what she shall do with the money once it has been recovered. *Johnston* v. *Henry Liston & Co.*[4] and *In re Embleton*[5]

"agreed to be paid shall be dealt "with as the court or a judge shall "direct and the said money or any "part thereof may be so directed— "(i) to be paid into the High Court "and to be invested or otherwise "dealt with there; (ii) to be paid into "the High Court and transferred to, "or where the money has been paid "into the High Court to be transferred to, the county court of the "district in which the infant or person of unsound mind resides. . . .

"(9) The provisions of this rule "shall also apply to all actions in "which damages are claimed or recovered by or on behalf of or "adjudged or ordered or awarded or "agreed to be paid to an infant or "person of unsound mind under the "Fatal Accidents Acts, 1846 to 1908, "and also to money which under "those Acts is recovered by or adjudged to be paid to the widow of "the person killed as they apply to "money recovered by or adjudged or "ordered to be paid to an infant. "Where such proceedings are taken "by or for the benefit of more than "one person and the amount recovered is to be divided amongst "such persons, the judge or jury as "the case may be shall divide and "apportion the share to be paid to "each of the said persons and the "amount so apportioned shall be "specified in the order or judgment "made or directed in the High "Court."

[4] [1920] 1 K.B. 99.

[5] [1947] K.B. 142.

decided that an infant could claim the whole fund when he came of age. Are there any sufficient reasons for applying a different rule to a widow on remarriage? If this appeal succeeds, it would have a curious result. Mrs. X, a widow, applies for payment out because she is about to marry Y. The court learns that Y is an undischarged bankrupt and refuses. A week later Mrs. X, now Mrs. Y, could demand the money as of right.

The object of the Act and the rule is to protect the widow's compensation. That is what Donovan J. emphasized in his judgment under appeal. There is admittedly no provision in the rule that the money is to be paid out on demand on her remarriage; and there is nothing which limits the court's protection to the period of widowhood. Morton L.J., in *In re Embleton*,[6] thought that the distinction between an infant coming of age and a widow remarrying was too fine; but the contrary view was not argued, and the dictum should not be affirmed. *Hamar* v. *Cunard White Star Ld., The Queen Mary*,[7] based on that dictum, was wrongly decided.

The applicant here has a two-fold description: (a) she is the wife of Mr. Taylor and so no longer *a* widow; (b) she is *the* widow of Mr. Ryan in the sense that she was his wife when he died, and for the purpose of identification under the Act and the rule she is "the widow of the person killed" and does not cease to answer that description on her remarriage.

Rudolph Castle-Miller for the applicant. A widow over 21 is not in ordinary circumstances under any legal disability, and only express provision by Act of Parliament could place her under such legal disability. The County Courts Act, 1934, s. 164 (the relevant section, section 205 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, having been repealed (see section 193 (4) and fifth schedule of the Act of 1934)), provides that section 164 shall apply to money recovered under the Fatal Accidents Act, 1846, by the widow of the person killed, as it applies to money recovered by an infant. *In re Embleton*[8] supports the view that when a widow remarries she ceases to be a person under a disability within the provisions of section 164 of the Act of 1934. That section should be construed in the strictest and narrowest sense, since it restricts the rights of persons sui juris to deal with their own property. Parliament may well have intended to protect a widow during widowhood because she might become a burden on the rates or public assistance. That consideration ceases to apply when she remarries. The danger that some widows might lose the fund intended for their benefit by reason of circumstances arising from their remarriage is not sufficient justification, in the absence of express statutory provision, for interfering with private rights to property of persons sui juris.

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[6] [1947] K.B. 142, 146.

[7] [1952] P. 148.

[8] [1947] K.B. 142.

The dictum of Morton L.J. in *In re Embleton*[9] that when the widow remarried she ceased to be the widow of the person killed and the discretion of the court came to an end is correct. It was relied on by Lord Merriman P. in *Hamar* v. *Cunard White Star Ld., The Queen Mary*,[10] which concerned a widow who had remarried.

J. P. Ashworth recalled.

[Somervell L.J. We want your assistance before giving judgment. The argument has proceeded mainly on the provisions of the County Courts Act, 1934, s. 164; but the money here is dealt with under Ord. 22, r. 14. We have to construe the rules and not the Act, and the rules deal only with procedure. Where is the power under which the rule was made which enacts that a widow of full age shall not enjoy the normal rights at law over money to which she is entitled? Control by the court is an infringement of those rights; and what troubles me is, as Warrington L.J. said in *Johnston* v. *Henry Liston & Co.*,[11] that statutory power is required to modify those rights. That is not a mere matter of procedure.]

The history is that the Fatal Accidents Acts first provided for an action in the High Court when an infant recovered damages. The Judicature Act, 1925, s. 205, was an enabling provision to give the High Court power to transfer the money to the county court. The Rules of the Supreme Court are concerned with actions which start in the High Court; and, once the money has been paid into court in accordance with those procedural rules and the action is proceeding, the jurisdiction giving the court power to control is derived from Ord. 22, r. 14. The power to make rules relating to the practice and procedure in High Court actions is implicit in the jurisdiction which the courts have generally over actions before them.

[Romer L.J. Then one cannot look at either Act for the purpose of construing this rule? One can look only at the rule.]

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[9] Ibid. 146.

[10] [1952] P. 148.

[11] [1920] 1 K.B. 99, 103, 104.

The sections referred to are enabling sections. They are the points at which Parliament has dealt with widows and their money. They incorporate the rules which are given statutory force in relation to actions in the High Court.

[SOMERVELL L.J. But they are not statute. Would you say that the Rule Committee could not, for instance, order that a person under 25 must agree to accept compensation, but that once an action is in process, the rule could direct that what is recovered under those proceedings must be paid into court?]

Yes.

[ROMER L.J. There are words in the statutory enactments which do not appear at all in the rule. Does one approach the rule with the view that prima facie the widow is entitled to the money, so that one must find something in the rule sufficiently clear to cut down her rights?]

Rather one can approach the rule, which is a rule dealing with money in court and what should happen to it, and ask: Is there anything in the rule which says that the situation must change when the widow remarries?

SOMERVELL L.J., stated the facts, read the relevant rules in Order 22, and continued:—Before I come to the reasons put forward by Master Burnand I will refer to the authorities which the judge himself referred to in the judgment from which this is an appeal. The first case in which this type of question was considered—I say "this type of question" because it was concerned not with a widow but with "a person under any legal "disability"—was *Johnston* v. *Henry Liston & Co.*[12] That case was concerned with one of the Workmen's Compensation Rules (rule 53) which provided as follows:

"Where an agreement is made for the payment of a lump "sum in lieu of a weekly payment to a person under any legal "disability, or for the redemption by a lump sum of a weekly "payment payable to a person under any legal disability, and a "memorandum thereof has been recorded in accordance with the "Act and these rules, such sum shall be paid into court, and shall "be invested, applied, or otherwise dealt with by the court in such "manner as the court in its discretion thinks fit for the benefit "of the person entitled thereto."

In accordance with that rule a sum of money had been paid into court in respect of an accident within the Act to an infant workman. The workman on attaining 21, applied for the money to be paid out to him, and this court held that he was entitled to have it paid out to him. Warrington L.J. said this [13]:—

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[12] [1920] 1 K.B. 99.

> "The Act could, of course, impose any restriction the "legislature thought fit on the right of a person of full age and "not otherwise under any disability to dispose as he pleases of "his own property, and some people may think it desirable "to maintain the condition of pupilage notwithstanding the "termination of the legal period of infancy, but in my opinion "the court ought not to be astute to discover such a restriction "of the rights of property, and ought not to hold it to be imposed "except by express words or by necessary implication."

Then he said that he could find nothing of the kind in that rule, and he analysed the particular words of the rule. Duke and Atkin L.JJ. agreed.

A similar problem, though not the present problem, came before this court in *In re Embleton.*[14] That case was not concerned with the Rules of Court which we have to construe, but with provisions in the County Courts Act, 1934, s. 164, which relate to the same subject-matter, infants and persons of unsound mind on the one hand, and widows on the other, in respect of whom sums recovered under the Fatal Accidents Acts are paid into court. Though the wording is somewhat different, I have myself come to the conclusion that the effect of the provisions there dealt with is the same as the effect of the rule which we have to construe.

[His Lordship read section 164 of the Act of 1934, and continued:] In that case again, the court was concerned with an infant who had attained 21, in respect of whom money recovered had been paid into the county court under that Act. This court held that the discretionary control of the fund terminated on the infant's coming of age and that the whole fund must be paid out on his application. They applied the case of *Johnston* v. *Henry Liston & Co.*[15] and Morton L.J. set out in his judgment the passage which I have cited from Warrington L.J. and, if I may say so with respect, I agree with the decision to which indeed I was a party, because it seems to me clear that with regard to people who are under a legal disability the principles laid down in *Johnston's* case[15] apply to the provisions which had to be construed in *Embleton's* case.[16] Morton L.J. in what is admittedly a dictum, went on to say[16]: "There is one possible

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[13] [1920] 1 K.B. 99, 103.

[14] [1947] K.B. 142.

[15] [1920] 1 K.B. 99.

[16] [1947] K.B. 142, 146.

" distinction between the present case and *Johnston* v. *Henry* " *Liston & Co.*[17] In subsection (3) of section 164, the provisions " of the section are applied to money ' adjudged or ordered to be " ' paid to the widow of the person killed.' Now the widow of a " person killed would not be a person under any legal disability " and, therefore, the passage from Warrington L.J.'s judgment " which I have already read would not apply verbatim to the " case of a widow; but I think it would be drawing far too fine " a distinction to say that the present case can be distinguished " from *Johnston* v. *Henry Liston & Co.*[17] on that ground. I " think the application of Warrington L.J.'s reasoning to the " case of a widow would be this: ' the words " for the benefit " ' " of the person to whom the order relates " seem to " ' me to mean for the benefit of a person already described— " ' namely, a person who is the widow of the person killed, and " ' when the person in question ceases to answer that description " ' the discretion ceases also.' Thus, if the widow remarried, " she would be entitled to have the money paid out to her. That " case is not before us, but it seems to me that this result must " logically follow."

A similar problem came before Lord Merriman P. in *Hamar* v. *Cunard White Star Ld., The Queen Mary.*[18] It arose over a question of taxation of costs, the details of which do not matter. But there was there a widow, as here, who had remarried. The President referred to the observations of Morton L.J. namely, that the discretion would cease on her remarriage, and though, as he pointed out, they are obiter he said[19]: " They form so integral " a part of the reasoning on which that case was decided that I " would long hesitate before dissenting, even if I disagreed with " them. I accept them gladly."

In this case, we have the advantage of argument by Mr. Ashworth on behalf of the Attorney-General as amicus curiae. He submitted that the decision by the President, based as it was on a dictum of Morton L.J., was wrong. If I may come back to the dictum, I think that Morton L.J. proceeded on the basis, to some extent, that unless a widow was treated as falling out of control if she remarried there was some difficulty in applying Warrington L.J.'s reasoning to subsection (1), where the cases of infants or persons of unsound mind were provided for. With respect, I do not find that difficulty. I think that Warrington

[17] [1920] 1 K.B. 99.
[18] [1952] P. 148.
[19] Ibid. 151.

L.J.'s reasoning does apply where the basis of the control is legal disability. If the legal disability ceases then there seems no reason why the control should not cease too, unless there are express words saying that it is to continue. I think that just as both in the County Courts Act and in rule 14 (9) the widow is separately provided for, so the construction of the words relating to her have to be considered by themselves in their context. The basis of Warrington L.J.'s reasoning does not seem to me to apply to a widow at all. She is not under any legal disability. Looking at these words (and one cannot elaborate very much one's reason for attaching a particular meaning to particular words in their context) I think that in their context the words "and also to money which under those Acts is "recovered by or adjudged to be paid to the widow of the person "killed as they apply to money recovered" are words of identification of a person rather than based on a legal disability because of her status. She does not on remarriage free herself from a legal disability that she had before, and if the words are words of identification she remains and will always remain the person who, at the time of the death, was the widow entitled to benefit under Lord Campbell's Act.

Donovan J. referred to a good example, which is to be found in the statute which we are considering, of a word plainly used as a word of identification which is immediately inapplicable if it is regarded as a word defining status. In the section which I have read from Lord Campbell's Act, it is said that the action is to be brought "for the benefit of the wife." Ex hypothesi by the time the action is brought it is contemplating something having happened under which she will have ceased to be the wife and will have become a widow. Though I do not say that that assists the construction of Ord. 22, r. 14 (9), it is a good example of the mode of construction of those words in their context which the judge applied, and with which I agree.

The judge went on to consider the purpose of the statute, referring to the similar provisions of section 164. There, with respect, I think that he went too wide. He referred to the fact that in many cases the widow will be someone of perhaps modest means who has not often had a large sum at her disposal. She might waste the money, or for other reasons, which he gave, it might be undesirable that it should not be controlled in her interests. I do not really get much help from that myself because, of course, that could be said of any lump sum recovered by any man or woman, young or old. Everybody may be foolish when they get a lump sum, not having been used to handling large sums before; so I feel, myself, that that argument is too wide. There is one reason which passed through my mind, but I do not really get much help from it, and it is this: there may be many cases in which there are children—and this is one—who no doubt themselves will get some apportionment, but where the apportionment to the widow will be on the basis that she will be expected to provide a home, with what I may call the normal amenities of a home, for the family. In such a case as that, it might well be desirable that the control should continue after a remarriage. The children may still be there, and what may be described as their interests in the money apportioned to the mother should be subject to control. The difficulty of getting very much help from that is that neither the rules nor the Act of Parliament restrict the control to cases of women who have children. I myself do not find any sufficiently clear purpose for the reason for this restriction in this particular class of case to aid me in construing the rule.

Therefore, I content myself with construing the rule; and, construing the rule, for the reasons which I have given, I think that these words are words of identification, and that the discretion remains in the court notwithstanding that the widow has remarried and, therefore, in that sense, is not aptly described as the widow of the deceased man. That was the position in respect of which she got the money and I think that the control continues to be attached to it. I think, therefore, that the appeal must be dismissed.

DENNING L.J. I agree. In *In re Embleton*[20] this court in effect wrote into the Act the words "during infancy." We are now asked to follow that decision to its logical conclusion and to write in the words "during widowhood." I do not think that we should do that, because I am quite sure that Parliament never intended it. This situation often arises when we are asked to proceed from one decision to another. It is rather like a journey when you come to a fork in the road. You take the one which you believe to be right, but before very long you discover that you are going in the wrong direction altogether. The wise traveller then takes the quickest way back to the right road. He does not go blindly on in the wrong direction.

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[20] [1947] K.B. 142.

In this case it only needs one illustration to show that we are asked to take the wrong direction. Take a widow who has been awarded £3,000 for the keep of herself and her children. She has been awarded it only because it represents the weekly amount which her husband would have allowed her. She becomes engaged to marry a man who is crippled with debts. If she applies to a master for £2,000 to pay his debts, the master would certainly refuse it. The next day she marries him. Is it to be said that she can forthwith take out the whole £3,000 and use £2,000 of it to pay his debts? Suppose he afterwards deserts her, or dies and she is left a widow again? She will have lost the maintenance that the £3,000 was intended to provide. This illustration shows that the widow of the deceased needs as much protection during remarriage as she needed during widowhood. An interpretation of that Act which deprived her of that protection would defeat the intention of Parliament. It is not that she is being kept out of the money. The master, if he thinks fit, will allow her money to help to furnish the new home. But it is very salutary for him to continue to have control over it. I find myself in full agreement with Master Burnand and Donovan J., and with all that my Lord has said.

ROMER L.J. I also agree. The argument for the appellant in effect is this: that under subrules (3) and (9) of Ord. 22, r. 14, three classes of persons are affected, namely, infants, persons of unsound mind, and widows of persons killed. This court, in *Johnston* v. *Henry Liston & Co.*,[21] said that an infant would be entitled to money paid in on his behalf on attaining 21 on the ground that at that age he became relieved of the disability, namely, infancy, which had debarred him from receiving the money earlier. The same process of reasoning would presumably result in a person of unsound mind being held entitled on becoming of sound mind, because he then becomes relieved of a disability, though a different one, and should, therefore, be treated in the same way as an infant on his attaining 21. One thus finds, it is argued, two categories which are affected by the order, each under a disability and each entitled to payment when their respective disabilities are removed. To those categories is added by Ord. 22, r. 14 (9), a third category, widows, and the suggestion is that to preserve the pattern or symmetry of the matter a similar element of removable disability should be introduced, in relation to this category, to that which characterizes

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the other two; and the element of disability suggested is widowhood, so that on remarriage the widow rids herself of her disability in the same way that infants do on attaining 21 and lunatics do on recovering their sanity. This argument is not without attraction, but I do not think that it should prevail. In the first place, while infancy and mental deficiency constitute recognized disabilities in law, widowhood does not, and, as far as I know, never has done, though the status of married woman did for very many purposes until recently. The characteristic which is common to the first two categories is accordingly found wholly wanting in the third and therefore affords no ground for any presumption of similar treatment.

I think, therefore, that one should approach the position of a widow with a mind unaffected by the implications which have been drawn with regard to infants and the fact that those indications would appear to be equally applicable to persons of unsound mind. Approaching the matter in that way, with that independence of mind and view, I can see no grounds for suggesting that a widow becomes freed from the court's discretion when she remarries. I could not formulate my opinion on that better than it has been expressed by Master Burnand in the passage where he said: "By remarriage she changes her status from widow to "married woman but she remains 'the widow of the person "'killed' who recovered money under the Fatal Accidents Act."

In other words, as my Lord has pointed out, the question is not one of status but of personality. You have to find the person who is affected and you need seek no further. Once you find the person affected, namely, the widow, then the money which has been recovered by or adjudged to be paid to her has to be dealt with in accordance with the subrules (3) and (9) of Ord. 22, r. 14, and those are the rules which furnish the discretion which remains exercisable in relation to that money.

It is well settled that if the capital and income of a legacy is given to an infant and the gift is followed by a direction that the capital is not to be paid to the infant until he attains the age of, say, 30, and there is no gift over in the event of his dying under that age, he can claim payment of the legacy when he attains his majority, the principle being that a man is entitled to possession of property in which no one but he has an interest. The application of that principle is in conformity with the judgment of Warrington L.J. in *Johnston's* case,[21] but the principle

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itself is quite irrelevant to the case of a widow where, notwithstanding the absence of any initial disability, the legislature authorized the retention of what prima facie is her own property.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Darracotts & Emtringham.*

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Evershed M.R., Birkett and Romer L.JJ.

HYDE *v.* PIMLEY AND OTHERS.

[Plaint No. G. 2685.]

Landlord and Tenant—Agreement not to sublet without the landlord's consent—Subletting without consent—Acceptance of rent with knowledge of breach—Claim for possession—No resistance by tenant—Claim against subtenants—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*d*).

A subletting by a tenant of a dwelling-house is not made "without the consent of the landlord" within the meaning of para. (*d*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, if at any time before the institution of proceedings for the recovery of possession of the premises the landlord has either expressly or by implication consented to it, whether or not the subletting constituted a breach by the tenant of the terms of the tenancy agreement. Accordingly where a tenant sublet the whole of a dwelling-house in breach of his tenancy agreement not to sublet without the consent of the landlord, but the landlord continued to receive rent from the tenant after becoming aware of the subletting and subsequently terminated the tenancy by notice to quit:—

Held, that the landlord's conduct amounted to a consent to the subletting, that para. (*d*) was accordingly excluded and his claim to recover possession from the sub-tenants by virtue of that paragraph failed.

Oak Property Co. v. *Chapman* [1947] K.B. 886 and *Regional Property Co.* v. *Frankenschwerth* [1951] 1 K.B. 631 applied as showing that para. (*d*) is not to be interpreted by a strict adherence to the tenses and times referred to.

APPEAL from Judge R. A. Willes sitting at Derby and Long Eaton County Court.

The plaintiff, Mrs. Hyde, was the owner of a dwelling-house, 17 Reginald Street, Derby, and in 1941 she let the premises to the first defendant, Miss Pimley, as secretary for and for and on behalf of the Derby Refugee Committee, at the weekly rent of 14s. 6d. The rent book on the terms of which the house was let contained an express prohibition against subletting without the landlord's consent. In September, 1947, the committee had ceased to require the house for refugees and the first defendant acting on their behalf sublet the whole of the dwelling-house to the second and third defendants, Mr. and Mrs. Reiter, without obtaining the landlord's consent.

The plaintiff gave notice to quit expiring on June 2, 1951, and on June 25, 1951, she commenced proceedings against all the defendants claiming possession of the house, arrears of rent and mesne profits. The first defendant admitted that the plaintiff was entitled to possession against the Derby Refugee Committee, the committee being unable to claim the benefit of the Rent Restriction Acts. By their defence the subtenants, while admitting that the house was sublet without obtaining the necessary consent, claimed that the plaintiff had accepted rent with full knowledge of the subletting, the fact of the subletting having been communicated on November 13, 1950, by the Hon. Treasurer of the committee to the plaintiff's estate agents, who afterwards accepted rent and remitted it to the plaintiff. It was therefore contended that the subletting was lawful and that the subtenants had become the plaintiff's tenants by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. At the hearing evidence was given that the rent had been paid after the subletting was known to the plaintiff's estate agents and remitted by them to the plaintiff.

The county court judge, after recognizing that the plaintiff was entitled to an order for possession against the first defendant, said that the plaintiff could not claim possession against the other defendants under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch I, para. (*a*), as the plaintiff by receiving rent had waived the breach of contract against subletting without leave. He proceeded to deal with the question whether the plaintiff was entitled to possession against these defendants under paragraph (*d*) and said that in his view while a person who had committed a breach of contract and been forgiven for so doing might be regarded as though he had not broken his contract when the breach of contract waived was a failure to ask permission to sublet, the waiver of that breach would not make the person into one who had permission although he did not ask for it and required forgiveness for not asking for it. It followed that paragraph (*d*) applied and there must be judgment against the subtenants. The subtenants appealed.

Megarry for the subtenants. The plaintiff brought these proceedings for possession against the subtenants on the ground of a breach of contract under the Rent and Mortgage Interest (Amendment) Act, 1933, Sch. I, para. (*a*). Alternatively he relied on paragraph (*d*) under which a breach of covenant is not required. The present position arose out of the fact that the judge found that the continued acceptance of rent operated as a waiver of the breach of covenant so that paragraph (*a*) did not apply; but he made an order for possession under paragraph (*d*).[1] There are two provisions protecting subtenants in the Rent Restriction Acts, namely, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and section 4 (5) of the Act of 1923. It is provided that any tenant to whom property has been sublet becomes the tenant of the landlord on the landlord obtaining possession against the tenant. In the present case, there was a lawful subletting, in view of the acceptance of rent and therefore the order made against the tenant should not have been treated as operating against the subtenants. But an order has also been made against the subtenants, although there was no ground for making it.

Two points arise on a claim under paragraph (*d*): (1) Is that paragraph satisfied? (2) If not, has there been waiver of that ground for claiming possession? The effect of a waiver is a point of great importance. In *Regional Property Ld.* v. *Frankenschwerth*[2] the full operation of paragraph (*d*) was considered, Evershed M.R. referring to *Dalrymple's Trustees* v. *Brown*[3] as showing that implied consent is sufficient for the purposes of paragraph (*d*). It is sufficient too, that the landlord should have become aware of the subletting after it had taken place, if thereafter, he goes on accepting rent so giving his implied consent. The object of paragraph (*d*) was to prevent there being enforced on a landlord something of which he is not aware. Here, however, after becoming aware of the particular act the landlord went on accepting rent. In *Downie* v. *Turner*[4] Jenkins L.J. in giving judgment said that the landlord there knew of the subletting in breach of a covenant in the tenancy agreement and thereafter received rent and continued: "In those circumstances, "I think the conclusion is inevitable that the landlord must be "taken to have waived not merely the breach of covenant against "underletting itself, but also the breach of the covenant as to user "so far as that breach was inseparable from . . . the subletting, "the breach constituted by which he had waived." This case is relied on to show that the one act complained of here was an underletting without consent under both paragraph (*a*) and paragraph (*d*) and that as to this act there was a waiver. In *Oak Property Co.* v. *Chapman*[5] the question of paragraph (*d*) was not considered but the reasoning in that case applies to paragraph (*d*). He referred also to *Norman* v. *Simpson*,[6] *Watson* v. *Saunders-Roe Ld.*[7] and *Roe* v. *Russell.*[8]

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[1] The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I: "A court shall . . . have "power to make or give an order or "judgment for the recovery of pos-"session of any dwelling-house to "which the principal Acts apply . . . "without proof of suitable alternative "accommodation (where the court "considers it reasonable so to do) if "(*a*) any . . . obligation of the "tenancy (whether under the con-"tract of tenancy or under the prin-"cipal Acts) . . . has been broken "or not performed . . . (*d*) the "tenant without the consent of the "landlord has at any time after the "31st day of July, 1923, assigned or "sublet the whole of the dwelling-"house or sublet part of the dwelling-"house, the remainder being already "sublet."

[2] [1951] 1 K.B. 631, 637.

[3] 1945 S.C. 190.

Christopher Lea (for *H. J. Garrard*). The suggestion has been made that the waiver of a breach of covenant is equivalent to a waiver of the particular act. But all that is waived is a particular remedy in respect of what the tenant has done. That amounts to forgiveness, which is not the same as waiver. It is not suggested that after waiver there would still remain the particular remedy, but waiver can be of the particular remedy only when the right to sue for breach of covenant is given up. Even after rent has been accepted by the landlord, paragraph (*d*) gives the court jurisdiction to make an order where the tenant has sublet without the consent of the landlord. A consent to the breach of a covenant against subletting does not impart also a consent to the particular act, and even though the tenant was allowed to remain in occupation that does not include also allowing the sub-tenant to remain. *Regional Properties Ld.* v. *Frankenschwerth*[9] shows that there has to be an active consent, although it may be implied. See also *Oak Property Co.* v. *Chapman.*[10] It has been suggested that the object of paragraph (*d*) is to prevent someone being forced on the landlord as a sub-tenant when there is no covenant against subletting. It would follow that, according to this argument, a sub-tenant becoming a tenant under section 15 (3) could always be got rid

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[4] [1951] 2 K.B. 112, 119.

[5] [1947] K.B. 886.

[6] [1946] K.B. 158.

[7] [1947] K.B. 437.

[8] [1928] 2 K.B. 117.

[9] [1951] 1 K.B. 631.

[10] [1947] K.B. 886.

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of. The point was taken in *Dalrymple's Trustees* v. *Brown*,[11] but did not prevail.

Megarry in reply.

Cur. adv. vult.

May 21. EVERSHED M.R., reading the judgment of the court, stated the facts and continued:—The judge expressed his view upon the claim that rent was accepted on the knowledge of the breach of contract as follows: "After knowledge of the tenant's "breach by subletting had so reached the plaintiff's agent, "cheques for rent accruing due for the period down to March, "1951, were actually sent by the tenant to such agent, and "passed through such agent's bank in the course of their duty "to collect the plaintiff's rent. I think it is probable that in a "firm such as this the actual receipt of the rent may not have "come to the knowledge of a member of the firm who knew of "the contents of the letter of November 13 and the consequences "of subsequently accepting rent. But, notwithstanding this, I "think it right to hold, treating this firm as though they were "the landlords, that what happened constituted a waiver by "their client of any right created by the committee's sub-letting "of the house to the Reiters without the consent of the plaintiff "or themselves." In June, 1951, the tenancy of the committee was determined by notice to quit, and on June 26 these proceedings were commenced, the plaintiff founding her claim to possession on the breach of covenant above referred to. The judge, as already stated, held that the plaintiff had waived her right to forfeit the lease and was therefore unable to rely on paragraph (*a*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. He held further, however, that as the plaintiff had not given her consent to the sublease she was entitled to claim possession under paragraph (*d*) of the same schedule, and in the exercise of his discretion he accordingly made an order for possession both against the committee and Mr. and Mrs. Reiter. The committee have not appealed against this order and the appeal which is before us has been brought by the Reiters. There has been no cross-appeal by the plaintiff in regard to the judge's conclusion upon paragraph (*a*) of the schedule, and the sole question before us is, therefore, whether the judge was right in holding that the plaintiff was entitled to claim possession against the sub-lessees on the ground that she had not consented to the underlease and that paragraph (*d*) of the schedule accordingly applied.

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[11] 1945 S.C. 190.

The judge was of opinion that consent to the commission of a particular act was not the same thing as forgiveness of the act after it had been committed. And so far we agree with him. But from this premise he went on to conclude (and it is here that we find ourselves at variance with his view) that if there has been in fact a subletting by a tenant of the whole premises without the consent of the landlord having been previously obtained, paragraph (*d*) of Sch. I to the Act of 1933 comes into operation and no amount of subsequent "waiver" of the effect of what has been done will displace that operation.

The question is one of the interpretation of the few words of the paragraph "the tenant without the consent of the landlord "has at any time after July 31, 1923, assigned or sublet the "whole of the dwelling-house. . . ." At first reading the words no doubt lend support to the judge's view; but we have come to the conclusion that they ought not to be so strictly construed. In the first place, the formula which has for many years been frequently used in leases—"without the consent of the landlord "being first had and obtained"—is not adopted. There are instead the few simple words "without the consent of the landlord." Secondly, this court held in the case of *Oak Property Co.* v. *Chapman*[12] that although before the issue of the proceedings there had been a subletting within the strict language of paragraph (*d*), the landlord could not invoke the paragraph if at the date of the summons the tenant had in fact regained possession of part of the premises—a conclusion which seems to indicate that the paragraph is not to be interpreted by a strict adherence to the tenses and times referred to.

It is, moreover, clear from the case of *Regional Properties Co. Ld.* v. *Frankenschwerth*[13] (in which the language of Lord Normand in the Scottish case of *Dalrymple's Trustees* v. *Brown*[14] was expressly adopted) that the landlord's consent may be implicit as well as express. Lord Normand's language included the following sentences: "I am clear that the words 'without the "'consent of the landlord' in paragraph (*d*) of Sch. I to the Act "of 1933 mean without actual consent given by the landlord "either expressly or by implication. That necessarily requires "that the landlord should have had knowledge of the sublease."

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[12] [1947] K.B. 886.

[13] [1951] 1 K.B. 631.

[14] 1945 S.C. 192.

It remains then to determine whether the consent, express or implied, must have been given at or before the time of the subletting, or may be given ex post facto. In this connexion it is to be remembered that the paragraph applies in a case where by the terms of the contract of letting no consent is required at all. In such a case a tenant who had omitted at the time of subletting to note the possible effect of paragraph (*d*) might have failed then to ask for consent. It would, we think, be startling if, though the tenant later repaired the omission and obtained the approval of his landlord, nevertheless paragraph (*d*) applied to enable the landlord to invoke the jurisdiction of the court. Nor does it seem to us a satisfactory answer to the example to say that the court in such a case would inevitably hold it unreasonable to make an order.

In our judgment, therefore, it is in accordance with the fair construction of the paragraph and the principles generally applicable in Rent Act cases to hold that paragraph (*d*) is excluded if in fact at any time before the issue of the proceedings, though not necessarily at or before the time of the subletting, the landlord's consent thereto has expressly or by implication been obtained. And, although, as we have said, the conception of consent to an act is not the same thing as waiver of its consequences—and the former conception is necessarily appropriate where the act in question is not itself a breach of any obligation—still the conduct of the landlord in the present case in accepting rent for a period of four and a half months with clear knowledge of the subletting which the judge held (and, as we think beyond doubt, rightly held) to amount to a waiver of the covenant, must inevitably amount also to a "consent" to the subletting in the sense of being a negation of any objection thereto: and all the more so since the subtenants were the same persons who had in another capacity been in fact the occupants of the premises ever since the tenancy began. For it seems clear that one object (at any rate) of paragraph (*d*) was to give some protection to a landlord against the risk of finding some person wholly unknown to him irremovably installed in his property.

On the question of the construction of the paragraph we find some support for our view in the language of Lord Watson in the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.*[15]: "That a landlord has, by implication, consented to receive an "assignee, or has so acted as to bar himself from alleging that

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[15] (1886) 11 App.Cas. 332, 337.

" he has not consented, must, in my opinion, be matter of " inference from the whole circumstances of the case. I can " easily conceive that the fact of the landlord having, in the full " knowledge of the cedent's actings, refrained from making any " objection to the assignee entering into possession, might, in " the absence of other evidence, be conclusive."

Mr. Megarry also put his case alternatively on the ground that, even if there were no consent within the meaning of paragraph (*d*), the landlord had by his conduct waived his right or remedy of application to the court by virtue of paragraph (*d*). The act complained of, he said, was a single act, whether giving rise to the court's jurisdiction under paragraph (*a*) or under paragraph (*d*) of the schedule, namely, the granting by the tenant of a subtenancy of the whole premises. Waiver of a non-recurring breach of covenant in a lease is in truth waiver, by affirmation of the continued existence of the term, of the right to which the breach gives rise of determining the lease and recovering possession of the land demised. Therefore (according to the argument) conduct in relation to one particular act, which operates as a waiver of the right to claim possession, so operates whether the right arises under the terms of the lease or contract itself, or under paragraph (*a*) or paragraph (*d*) of Sch. I to the Act of 1933, and whether or not such conduct amounts to " consent " within the meaning of the latter paragraph.

We prefer to base our judgment in the present case on the ground already stated that the landlord's conduct must in the circumstances amount to a " consent " on the landlord's part within the meaning of paragraph (*d*). That paragraph is, after all, expressed not as providing a remedy for the landlord but as a condition for the exercise by the court of its power to make an order for possession. No doubt the circumstances of a particular case may be such as in effect to estop a landlord from asserting the facts necessary to show that the condition is fulfilled. On the other hand, if the lease or contract is still subsisting, the mere fact that there has been an assignment or underletting without the landlord's consent will not give rise to any right in the landlord to claim possession, e.g., where by the terms of the lease or contract the tenant is at liberty to assign or underlet as he wills. In the circumstances we do not find it necessary to pursue further this part of the appellant's argument, except to say that in our opinion the case of *Downie* v. *Turner*[16] relied upon by Mr. Megarry does not assist him to advance the argument. Nor do we express any concluded view on the third way in which Mr. Megarry put the appellant's case, which was based on sections 4 (5) of the Act of 1923 and 15 (3) of the Act of 1920 and was to the following effect: even if the underletting in question was "without the consent of the landlord," still, since the breach of contract occasioned by the subletting had, according to the judge's findings, been waived before the issue of the summons, such underletting could not be regarded as "unlawful" within the meaning of sections 4 (5) of the Act of 1923 and 15 (3) of the Act of 1920: see *Norman* v. *Simpson*.[17] Accordingly, though (on the hypothesis assumed) the landlord might be entitled to an order for possession against the tenant, he could obtain no such order against the subtenant.

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[16] [1951] 2 K.B. 112.

The point is, in our judgment, one of considerable difficulty. The language of sections 4 (5) of the Act of 1923 and 15 (3) of the Act of 1920 fits ill (it must be confessed) with the language of paragraph (*d*) of Sch. I to the Act of 1933. In the Scottish case of *Dalrymple's Trustees* v. *Brown* [18] it appears that the point was clearly put in argument to the Inner House. But there is no reference to it in the judgments: and, since the House dismissed the appeal and affirmed the order for possession against both tenant and subtenant, it must be assumed that Lord Normand and his colleagues regarded sections 4 (5) of the Act of 1923 and 15 (3) of the Act of 1920 as not available to the subtenant, and the subtenancy as being "unlawful" within the meaning of those sections, although there was no prohibition according to the general law of Scotland against assignment or underletting on the tenant's part. In the English case of *Roe* v. *Russell* [19] Eve J., sitting in the Court of Appeal, intimated his view that an assignment or underletting of the whole premises should be regarded as "unlawful" for the purposes of the Acts, whatever the terms of the original contract: but the learned judge's language in the context in which it appears may perhaps be properly confined to the case of an assignment or underletting by the statutory tenant.

We do not find it easy, upon authority or principle, to regard an assignment or underletting of the whole premises by a contractual tenant as being for any purposes "unlawful" if by the terms of the contract there was no restriction on the tenant's power to assign or underlet, or if the assignment or underletting having been in breach of the tenant's obligations, the breach had been afterwards waived by the landlord. But it is, in the circumstances, unnecessary for us to express any conclusion on the point, and we therefore say no more about it.

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[17] [1946] K.B. 158.

[18] 1945 S.C. 192.

[19] [1928] 2 K.B. 117, 141.

For the reasons we have given, we think that the plaintiff was not entitled to rely on paragraph (*d*) of the schedule; and as she was held also not to be entitled to rely on paragraph (*a*), we think her action should have been dismissed. The appeal must be allowed accordingly.

Appeal allowed.

Solicitors: *G. A. Hathway, for Flint, Bishop & Barnett, Derby; Hawley & Rodgers, Loughborough.*

H. C. G.

BUCKINGHAM COUNTY COUNCIL *v.* CALLINGHAM AND ANOTHER.

C. A.
1952
Feb. 13, 14;
Apr. 7.

Singleton and Morris L.JJ. and Lloyd-Jacob J.

Town and Country Planning—Resolution to prepare scheme—Model village—"Development" otherwise than in accordance with interim development order—"Works on land . . . deemed to have been "carried out . . . in contravention of previous planning control . . ." —Enforcement notice—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 75 (1), (9).

The owners of a model village, known as Bekonscot, appealed against an enforcement notice served by the Buckingham County Council requiring the demolition or removal of the village on the ground that it was "a contravention of previous planning control "as defined in section 75 of the Act of 1947."

The village, built to scale in a garden at Beaconsfield, had been open to the public since August, 1929, although it was not completed until 1933 and improvements had been carried out after that date. In September, 1929, the Buckingham County Council had passed a resolution to adopt a planning scheme but no scheme was ever approved. No application was made for interim development permission in respect of the extensions and development of the village made after the resolution took effect, either under the Town Planning (General Interim Development) Order, 1922, which was current at the date of the resolution, or the similarly entitled order of 1933, which repealed the earlier order as from April 1, 1933:—

Held, that, notwithstanding their small size, the buildings and works comprising the model village were "development" within section 12 of the Town and Country Planning Act, 1947 and section

53 of the Act of 1932, and were "development of estates and building "operations" for the purposes of section 45 of the Housing and Town Planning Act, 1919. An application for interim development permission could therefore have been made, but was not, under the orders of 1922 and 1933. Further, they were "works on land" for the purposes of section 75 (9) of the Act of 1947. Consequently, all the works which were not "existing buildings" when the resolution took effect were, by sections 75 (9) (*a*) and 119 (1) of the Act of 1947, "deemed" to have been carried out in contravention of previous planning control, because they had been carried out "otherwise than in accordance with" permission granted under the interim development order of 1933. Those words were apt to cover works carried out between the date when the resolution took effect and the date when the order of 1933 became effective as well as the works done after that date.

Decision of Divisional Court affirmed.

APPEAL from Divisional Court.

On October 24, 1950, Buckingham County Council, at that time the local planning authority, served on the present appellant, Callingham, an enforcement notice under sections 23 and 75 of the Town and Country Planning Act, 1947,[1] requiring the

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[1] Town and Country Planning Act, 1947, s. 12 (1): "Subject to the provisions of this section and to the "following provisions of this Act, permission shall be required under this "Part of this Act in respect of any "development of land which is carried "out after the appointed day."

Subs. (2): "In this Act, except "where the context otherwise requires, "the expression 'development' means "the carrying out of building, engineering, mining or other operations "in, on, over or under land, or the "making of any material change in "the use of any buildings or other "land;"

S. 18 (1): "The power to grant "permission to develop land under "this Part of this Act shall include "power to grant permission for the "retention on land of any buildings "or works constructed or carried out "thereon before the date of the application, . . ."

S. 23 (1): "If it appears to the local "planning authority that any development of land has been carried out "after the appointed day without the "grant of permission required in that "behalf under this Part of this Act ". . . the local planning authority "may within four years of such development being carried out . . . "serve on the owner and occupier of "the land a notice under this section."

Subs. (2): "Any notice served under "this section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission as aforesaid . . . and may require . . . steps ". . . to be taken . . . as may be "specified . . . and . . . any such "notice may . . . require the demolition or alteration of any buildings "or works, the discontinuance of any "use of land, or the carrying out "on land of any building or other "operations."

Subs. (4): "If any person on whom "an enforcement notice is served . . . "is aggrieved by the notice, he may ". . . appeal against the notice to a "court of summary jurisdiction . . . "and on any such appeal the court— "(*a*) if satisfied that permission was "granted under this . . . Act, . . . "or that no such permission was demolition or removal of a model village known as Bekonscot. The enforcement notice read as follows: "Take notice that the "county council of the administrative county of Buckingham, "as the local planning authority, in pursuance of their powers "under section 23 of the Town and Country Planning Act, 1947, "hereby declare that the development specified in the first

"required in respect thereof, . . . "shall quash the notice to which the "appeal relates;"

S. 75 (1): "Where any works on "land existing at the appointed day "were carried out, or any use to which "land is put on that day was begun, "in contravention of previous planning control, then, subject to the "provisions of this section, the provisions of Part III of this Act [which "includes section 23] . . . shall apply "in relation thereto as they apply in "relation to development carried out "after the appointed day without the "grant of permission . . . under the "said Part III."

Subs. (4): "The power of the local "planning authority under Part III "of this Act to grant permission for "the retention on land of buildings "or works constructed or carried out "before the date of application . . . "shall include power to grant such "permission in respect of any buildings or other works . . . in respect of "which that authority are empowered "to serve an enforcement notice by "virtue of the provisions of this "section; . . ."

Subs. (5): "In relation to an enforcement notice served by virtue "of this section, subsection (4) of "section 23 of this Act shall have "effect as if for paragraph (*a*) thereof "there were substituted the following "paragraph:—'(*a*) if satisfied that "'the works or use to which the "'notice relates are not works or a "'use to which section 75 of this Act "'applies, shall quash the notice to "'which the appeal relates.'"

Subs. (9): "For the purposes of "this section, works on land shall be "deemed to have been carried out, and "uses of land to have been begun, in "contravention of previous planning "control—(*a*) where at the material "time the land was subject to a resolution to prepare a planning scheme, "if carried out or begun otherwise "than in accordance with permission "granted in that behalf by or under "the interim development order."

S. 119 (1): "'Building' includes "any structure or erection; . . . 'Interim development order' means "an order made under subsection (1) "of section 10 of the Act of 1932. . . ."

Housing, Town Planning, etc., Act, 1919, s. 45: "The local government "board may by special or general "order provide that where a resolution "to prepare or adopt a town planning "scheme has been passed, . . . the "development of estates and building "operations may be permitted to "proceed pending the preparation or "adoption and approval of the town "planning scheme, subject to such "conditions as may be prescribed by "the order. . . ."

Town and Country Planning Act, 1932, s. 10 (1): "The Minister shall "make a general order with respect "to the interim development of land "within the areas to which resolutions to prepare or adopt a scheme "apply and may make special orders "with respect to the interim development of any such land in any "particular area.

"For the purposes of this section the "expression 'interim development' "means development between the date "on which the resolution takes effect, "and the date of the coming into "operation of the scheme."

Subs. (2): "An order made under "the preceding subsection (in this Act "referred to as 'an interim development order') may itself permit the "development of land either unconditionally or subject to any condition "specified in the order, or may empower any authority so specified to "column of the schedule hereto had been carried out in contravention of previous planning control as defined in section 75 of "the said Act." The first item in the first column of the schedule read: "Development.—(1) Use of land lying between "Warwick Road and Ledborough Lane in the urban district of "Beaconsfield in the county of Buckingham for purposes other "than the curtilage of a private dwelling-house, namely, for the "purpose of a public exhibition known as Bekonscot Model "Village." Opposite that, in the second column of the schedule, were set out the steps required to be taken: "Discontinuance." The second item in the first schedule was: "Development.— "(2) Building, engineering and other operations in and on land "lying between Warwick Road and Ledborough Lane in the "urban district of Beaconsfield, in the county of Buckingham, "comprising Bekonscot Model Village." In the second column the steps specified were: "Demolition and/or removal."

On appeal against the enforcement notice at the hearing before the justices the following facts were proved or admitted: Callingham was the owner of a garden of high standard to which he admitted the public, making a charge for charitable purposes. Between 1923 and 1928 he acquired adjoining land, and in the autumn of 1928 work was begun on the land for the purpose of

"permit the development of land in "accordance with the terms of the "order."

S. 18 (1): "Subject to the provisions "of the Act, any person—(*a*) whose "property is injuriously affected by "the coming into operation of any "provision contained in a scheme, or ". . . (*b*) who suffers damage by "reason of any action taken by a "responsible authority under section 13 "of this Act, . . . shall, if he makes "a claim within the time limited . . . "be entitled to recover . . . compensation from the responsible authority."

S. 20 (2): "A person shall not be "entitled to recover compensation . . . "in respect of any action taken . . . "under section 13 . . . except in a "case where a building or work which "the authority have removed, pulled "down or altered, was an existing "building or an existing work. . . ."

S. 53: "'Buildings' includes structures and erections; 'Building operations' includes any road works "preliminary, or incidental, to the "erection of buildings; 'Development,' in relation to any land, "includes any building operations or "rebuilding operations, and any use "of the land or any building thereon "for a purpose which is different "from the purpose for which the land "or building was last being used; "'Existing building' and 'existing "work' [in relation to 'the material "date'] mean respectively a building or work erected, constructed or "carried out before the material date, "and include also a building or work "—(i) erected, constructed or carried "out in pursuance of a contract made "before the material date; or (ii) begun before, but completed after, that "date; or (iii) erected, constructed or "carried out in accordance with the "terms of an interim development "order, whether made under this Act "or any Act repealed by this Act, or "of permission granted under such "an order."

erecting a model village. At the beginning of 1929 preliminary work was done in connexion with the construction of a model railway and the erection of model buildings. By August, 1929, the general lay-out of the village and the model railway within an area delimited by a red line on the plan attached to the findings had been fixed. Within that area model buildings, including a church, school, post office and council offices had been erected. Outside the red line development had commenced, consisting of the general lay-out of the pond, banks and rockeries. The area of that further development was limited on the plan by a blue line. The justices found that by that date the use of the area for its present use had been established.

On September 24, 1929, Buckingham County Council passed a resolution to prepare a town planning scheme for the urban district in which the model village was situated, and the resolution was entered on the register of local land charges on September 30, 1929. No application for planning permission was submitted in respect of the land on which the model village was situated.

Between the end of September, 1929, and April 1, 1933, the village and railway were substantially completed. After the latter date the railway was extended and further buildings were erected outside the red line but within the blue line on the plan.

The model buildings were from two to four feet high on the scale of one inch to the foot. Most of them were constructed of stone or brick and fixed to concrete bases on the ground. Since the summer of 1931 the village had been regularly opened to the public every Sunday afternoon and on several days in the week, and it was operated by a charitable association of which the second appellant was a trustee.

The justices held as to item 1 in the first column of the schedule to the enforcement notice that the use of the whole area for the purposes of a public exhibition had been established before the resolution to prepare a town planning scheme was passed in 1929, and as to item 2 in the first column of the schedule that the works complained of were not works to which section 75 of the Town and Country Planning Act, 1947, applied. Accordingly they quashed the notice under sections 23 (4) (*a*) and 75 (5) of that Act, but agreed to state a case. Before the Divisional Court the county council contended against the finding of the justices that the works complained of were not within the ambit of the Act of 1947, but accepted the finding as to anything done on the land before September 30, 1929, so that no question of change of use as specified in item 1 in the schedule to enforcement notice arose.

The Divisional Court allowed the appeal and held that section 75 of the Act of 1947 applied to all the model houses and other things—which were structures or engineering works, buildings, constructions or erections on the site—put up since October 1, 1929, and that these, having been carried out or erected in contravention of planning control as enacted before the Act of 1947, were affected by the enforcement notice served by the county council.

Callingham and the trustee appealed.

H. Willis for Callingham and the trustee. I submit that the model village was not a contravention of previous planning control for the purposes of section 75 (9) of the Act of 1947. It is conceded by the county council that that part of the village which was erected before the resolution to adopt a planning scheme came into force is not a contravention. I submit, further, that the work done after that date but before the Act of 1947 is also not within section 75 (9). Section 75 (9) (*a*) refers to the Interim Development Order of 1933.[2] Many of these models were erected before that Order came into force on April 1, 1933, and as the Order was not retrospective they could not possibly be affected by it. As regards the works done after the Order came into force, it is submitted that they were not "building operations" to which the Order applied, and that, consequently, even if the owners had been minded to apply for permission to carry out interim development, they could not have done so under that Order. Section 75 (9) (*a*) of the Act of 1947 provides that "works on land" carried out otherwise than in accordance with permission granted under the Order of 1933 (incorporating the definition in section 119 (1)) shall be deemed to be contraventions of previous planning control. In other words "works on land" are to be deemed to have been carried out in contravention of previous planning control if they were carried out after the date of the resolution to prepare a scheme without a permission granted under the Order of 1933, in those cases where the procedure in that Order was available to the person carrying out the works. It is submitted that that provision does not apply to works for which permission was not required under the Order, or which had been carried out before the Order came into force. It is submitted that section 75 (9) (*a*) refers to works which were within the scope of the Order and were carried out in direct defiance of it. If that is not so, it would mean that works which had been sanctioned under the Order of 1922,[3] or some earlier Order, might nevertheless be contraventions of planning control by virtue of section 75 (9) (*a*). It was impossible to act "otherwise than in accordance with" the Order before it existed. If the draughtsman had intended to make section 75 (9) (*a*) apply to works carried out before April 1, 1933, it would have been simple for him to have done so. Between 1929 and 1933 there was no obligation to apply for permission to carry out this development, but if it is now held to be a contravention of planning control, the owners will get no compensation for any part of the village which is affected by the enforcement notice. Between April 1, 1933, and July 1, 1948, development was not prohibited in areas which were affected by a resolution to prepare or adopt a planning scheme, but developers were at risk of a scheme being ultimately adopted, in so far as the works they carried out were "building operations" to which the Order of 1933 applied. "Buildings" includes structures and erections by definition in section 53 of the Act of 1932. None of those words are words of a precise meaning and, therefore, in construing them, it is permissible and essential to look at the intention of the Act of 1932. If that is done, it is clear that these works are not within the mischief. The justices had the advantage of seeing the village, and it is submitted that on a question of degree, such as this is, it would be wrong to upset their findings of fact without having had that advantage. In *Lavy* v. *London County Council*[4] it was said that a little wall was not a wall at all for the purposes of the Metropolis Management Act, 1862, and it is submitted that these small models cannot be considered as being "buildings" for the purposes of the Act of 1932.

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[2] Town Planning (General Interim Development) Order, 1933 (S.R. & O. 236).

Higham v. *Havant and Waterloo Urban District Council*[5] is not against me, because it was there admitted that there was a contravention of previous planning control unless the licence, deemed to have been granted under the Public Health Act, 1936, amounted to permission for the purposes of section 75 (9) of the Act of 1947.

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[3] Town Planning (General Interim Development) Order, 1922 (S.R. & O. 927).

[4] [1895] 2 Q.B. 577.

[5] [1951] 1 K.B. 509.

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W. L. Roots for the county council. Although the village had been open to the public as long ago as 1931, it had been greatly developed after 1933 and was a threat to the amenities of the district. The provision in section 75 (9) (*a*) of the Act of 1947 that any works on land carried out after the resolution were to be deemed to be contraventions of previous planning control unless permission had been obtained for them under the Order of 1933 is clear and unambiguous. It would seem that work done after the material date, but before the Order of 1933 came into force, would be affected also. I submit that the establishment and development of Bekonscot was "development of estates and "building operations," and "development," under the Orders of 1922 and 1933, respectively, for which the appellants could, and should, have got permission. There is no reason to suppose that Parliament would intend to exclude a public exhibition from the scope of the Act of 1947, and I submit that the works were also within the ambit of the Acts of 1932 and 1935. The words "building operations" in section 53 of the Act of 1932 are clearly intended to have a wide meaning, and I submit that the expression "development of estates and building operations" in the earlier Acts and Orders carried an equally wide meaning though it was not defined. It is noticeable that section 53 of the Act of 1932 defines "buildings" as including structures and erections. It is not an exhaustive definition. I submit that this village is both a building operation and a use of land. The size of the models is irrelevant; recent general development orders have specifically permitted certain small erections, implying that, but for such permission, they would have been controlled. This public exhibition is comprised of small items which are structures and erections, and they are the product of building operations. Permission was not in fact granted to the appellants under any earlier Order, so that the effect of section 75 (9) (*a*) in cases where such permission had been sought and obtained before the Order of 1933 came into force is not in point here. Possibly the position would be safeguarded by article 3 of the Order of 1933 and section 54 of the Act of 1932, for, although the Order of 1922 was repealed by the Order of 1933, it was provided that the permissions given under the repealed Order were unaffected. It is clear, however, that work, such as this, which had been at peril prior to the passing of the Order of 1933, because interim development permission had not been obtained, remained at peril throughout unless permission was obtained. It was possible to apply for and obtain permission under that Order for work which had been done before the Order came into force.

[LLOYD-JACOB J. said that section 75 (9) appeared to relate specially to cases where permission had been granted but work had been done otherwise than in accordance with the conditions attached to the permission. It did not seem to apply to cases where no request for permission had been made. It might be that such cases would be contraventions under section 75 (1), for that subsection appeared to deal with two distinct matters of complaint, viz., (a) development which was wrongly carried out under the Act of 1947, and (b) work which had been carried out or begun in contravention of previous planning control (i.e., which had been carried out prior to 1947).]

Section 75 (9) is not all-embracing, but section 75 (1) is.

[SINGLETON L.J. But unless the work at Bekonscot is a contravention under section 75 (9) it is merely at risk and is not contravention. It is not sufficient merely to come within section 75 (1).]

Willis in reply. If the interpretation of section 75 (9) suggested by Lloyd-Jacob J. is right, these works are not contraventions. It is, however, submitted that section 75 (9) is intended to have a compendious meaning and that the draughtsman clearly had in mind that it would cover the whole field. It is submitted, however, that this section cannot apply to works for which no permission was possible under the Order of 1933 because either they were outside the scope of the Order or had been done before the Order came into force. Section 75 (9) sets out clearly what matters are to be deemed to be contraventions, and it has no doubt been limited to restrict the numbers of enforcement notices. Mr. Roots submitted that article 3 of the Order of 1933 covered the position where work had been sanctioned under the Order of 1922, but I submit that that provision has no bearing on this point at all.

Cur. adv. vult.

April 7. The following judgments were read:—

SINGLETON L.J. This is an appeal from an order of the Divisional Court on a case stated by the Buckingham justices.

I am clearly of opinion that that which has taken place at Bekonscot is " development " within the definition of that term in section 53 of the Town and Country Planning Act, 1932, and

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in section 12 of the Town and Country Planning Act, 1947. To carry the matter a stage further back, that which was done was within the words "the development of estates and building "operations" which might be permitted to proceed pending the preparation or adoption and approval of a scheme under section 45 of the Housing and Town Planning Act, 1919, the same words appearing also in the Order of 1922. There is no substance in the submission that because this is a model village, or because the buildings are small, neither is, or are, within the planning legislation. The appellants could, had they so desired, have applied to the local authority for interim development permission under the Order of 1922, but they did not do so. No material change in this respect was made by the Act of 1925.

The more difficult position is that which arises as to buildings, etc., erected after September 24, 1929, the date on which the local authority passed the resolution, and before the coming into force of the Order of 1933. The order of the Divisional Court does not affect buildings or development before the date of the resolution, but, under that order, development after September 24, 1929, is held to be subject to the powers given by the Act of 1947.

The earlier Town Planning Acts envisaged the adoption of a scheme and the payment of compensation to a person whose land was injuriously affected by such a scheme, but compensation was not payable on account of any building which had been erected on land involved in a scheme after the date of the resolution of the local authority to prepare or adopt a scheme. (See section 58 of the Act of 1909; section 45 of the Act of 1919, and the Third Schedule thereto; and section 10 (2) of the Act of 1925.)

Section 10 of the Act of 1932 imposed on the minister a duty to make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied. The Order of 1933 followed; it revoked the Order of 1922. Article 2 of the Order of 1933 takes one back to the date of the resolution of September 24, 1929, for it defines "existing building" as "a building erected or constructed "before the resolution date, and includes a building . . . begun "before, but completed after, that date"; and the resolution date means the date on which a resolution, or an application for authority, to prepare or adopt a scheme took effect.

Thus it seems clear that buildings erected after September 24, 1929, but before the coming into force of the Act of 1932 and

Order of 1933 were not "existing" buildings for the purpose of that Act and Order.

Section 13 of the Act of 1932 gives the responsible authority power to enforce schemes and carry them into effect by removing, pulling down, or altering buildings. Under section 18, any person whose property was injuriously affected thereby could obtain compensation, but section 20 (2) provided that such compensation should not be recoverable unless the building, etc., was an "existing building." It follows that if there had been a scheme under the Act of 1932, any building erected without permission after the resolution of 1929 could have been pulled down by the planning authority without payment of compensation. There was no scheme, and all this procedure was altered by the Act of 1947, Part III of which deals with control of development. Permission to develop land is required by that Act, and sections 12 to 19 cover that. Section 23 deals with enforcement of planning control after the appointed day [July 1, 1948], and it is under this section that the enforcement notice was served, and that the appellants appealed to the court of summary jurisdiction. Section 75 (1) makes this procedure available where any works on land existing at the appointed day were carried out in contravention of previous planning control. It is claimed on behalf of the appellants that the buildings were not works on land erected in contravention of previous planning control. It is true that no permission had been asked for or given, and, to that extent, the appellants were at risk. The planning authority might have taken steps under section 13 of the Act of 1932 if a scheme had been adopted and approved, and no compensation would then have been payable, but the Act of 1932 was repealed by the Act of 1947, and it is said that no steps can now be taken under the Act of 1932. It becomes necessary to consider section 75 (9) of the Act of 1947. [His Lordship read the subsection and continued:] The interim development order referred to in that subsection is the Order of 1933. I should add that under section 18 of the Act of 1947 (amplified by section 75 (4)) the power to grant permission to develop land under Part III of the Act includes power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application; from which it would seem that the appellants could have applied in respect of the buildings erected between 1929 and 1933.

The question for decision is whether such buildings were erected otherwise than in accordance with permission granted under the Order of 1933. The answer seems to me to be clear. No permission was asked or given, and consequently they were not erected in accordance with permission given under that order. And, if I am right in my reading of section 18 and section 75 (4) of the Act of 1947, it is no excuse to say that application could not be made under the Order of 1933 for something done before the date of the order (assuming that to be right), for application was possible under section 18 and section 75 (4) of the Act of 1947; and if the application had been successful, no question of enforcement under section 23 would have arisen. It must not be taken that I agree that no application was possible under article 5 of the Order of 1933 to permit a development of this land merely because some part of the work of development had been commenced or carried out after the date of the resolution and before the coming into force of the Order of 1933—as to which see the transitional provisions in section 52 (2) of the Act of 1932, and sections 53 and 54.

The scheme of the town planning legislation is to control planning and development; under the Act of 1932 and the Order of 1933 existing buildings (as defined) are not affected. The definition of existing buildings in the order does not cover buildings erected after the date of the resolution unless they were begun before that date. Under section 52 (2) of the Act of 1932 the resolution of 1929 is to have effect as if it were a resolution passed by the authority and approved by the Ministry under the Act of 1932. Section 54 repeals the Act of 1925, but nothing in the repeal is to affect any approval or consent given under any enactment repealed, from which it would appear to follow that if any works were carried out for which permission was given, it could not be said that they were otherwise than in accordance with the order made under the Act of 1932.

In my opinion, the works begun after the date of the resolution, and before the Order of 1933 came into force, were carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order, and this appeal should be dismissed. Buildings begun before the date of the resolution and completed afterwards would, however, appear to fall within the definition of "existing "building" in the order.

MORRIS L.J. On September 24, 1929, the Beaconsfield Urban District Council passed a resolution to prepare a town planning scheme for the Beaconsfield Urban District. No question is raised in regard to anything which was done at Bekonscot on or before such date. There was then in force the Town Planning (General Interim Development) Order, 1922, which was made by the Minister of Health under section 45 of the Housing Town Planning Act, 1919. Though the Town Planning Act, 1925, repealed that part of the Housing Town Planning Act, 1919, which contained section 45, it was provided by section 21 (1) of the Act of 1925 that the repeal should not affect any order made under the repealed part of the Act of 1919, and that any order should have effect as if made under the corresponding provision of the Act of 1925. Section 4 of the Act of 1925 contained provisions which corresponded with section 45 of the Act of 1919. In each section is to be found the phrase "development "of estates and building operations." The phrase is, therefore, found in the Town Planning (General Interim Development) Order, 1922. After the passing of the resolution to prepare a town planning scheme it was open to the appellants to have applied to the local authority for permission to do any work that would come within the phrase "development of estates and "building operations." The work in fact done between the end of September, 1929, and April 1, 1933, consisted, as the justices have found, in completing the village in the south-west of the area within the red line on the plan attached to the case, together with the model railway on the land.

The justices found that during that period the development had become known as "The Bekonscot Model Village and "Railways." On the facts as found, I am of the opinion that the work done during that period would properly fall to be described as being within the phrase "development of estates "and building operations." No application for permission was in fact made.

The Town Planning Act, 1925, was repealed by the Town and Country Planning Act, 1932, which came into operation on April 1, 1933. [His Lordship read section 10 (1), referred to the definitions of "building" and "development" in section 53, and continued:] In exercise of the powers conferred upon him by section 10 of the Act of 1932, the Minister of Health made the Town and Country Planning (General Interim Development) Order, 1933, which came into force on April 1, 1933. By art. 4 of that Order certain development was permitted pending the coming into operation of a scheme. Included in such permitted development were, in the case of an existing building: (i) works necessary for the maintenance of the building; and (ii) works of alteration neither affecting the exterior of the building, nor proposed in connexion with a different use of the building.

An "existing building" was defined as meaning a building erected or constructed before the date on which a resolution or an application for authority to prepare or adopt a scheme took effect; it also included a building erected or constructed in pursuance of a contract made before or begun before, but completed after, the resolution date.

It was found by the justices that small replacements to the model buildings in the village were carried out from time to time. The justices have not specified, however, or have not found what "buildings" were erected or constructed before the date on which the resolution took effect. It will, in my judgment, be necessary to have findings as to this matter. It is to be pointed out that any "buildings" begun before but completed after such date, or any "buildings" erected or constructed in pursuance of a contract made before such date, are likewise to be regarded as "existing" buildings.

The justices found that after April 1, 1933, the railway was extended and further model buildings were erected outside the area of the original village, but within the blue line on the plan. In my judgment, the railway is either a "structure" or an "erection," and the model buildings are also either structures or erections. Small or model buildings may only be small structures or small erections, but they are, nevertheless, within the definition of the word "buildings."

No application for planning permission was made after April 1, 1933, and, in my judgment, the work done after that date was work for which, within the definitions in the Act of 1932 and the Order of 1933, permission might have been sought.

By article 3 of the Town and Country Planning (General Interim Development) Order, 1933, it was provided that the Town Planning (General Interim Development) Order, 1922, was revoked.

Although I have referred to the permissions which the appellants could have sought under the General Interim Development Orders of 1922 and 1933, the matters arising in the present appeal fall to be determined by reference to the construction of section 75 of the Town and Country Planning Act, 1947. By Part I of that Act it was provided that general permission was required in respect of any development of land which was carried out after July 1, 1948. The expression "development" meant (subject to some exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land. Certain provisions for the enforcement of planning control were embodied in section 23 of the Act.

[His Lordship then read section 75 (1) and continued:] The notice which was served on October 24, 1950, by the Buckingham County Council (who were then the local planning authority) on the appellants was served in reliance on the provisions of section 75 of the Act of 1947. The planning authority must show that any "works on land" or any user, to which they take exception, were carried out or begun in contravention of previous planning control. There is no definition in the Act of the phrase "works on land."

The notice served upon the appellants shows that the respondents adopted the language of the definition of "development" contained in the Act of 1947.

[His Lordship then read the notice and continued:] It will be seen that the heading of column 1 of the schedule to the notice was "Development," and that under item No. 2 in that column the words employed are words taken from the definition of "development" which is contained in the Act of 1947.

[His Lordship referred to the finding of the justices that the user of the area as a model village had been established before the resolution was adopted, and to the consequent abandonment by the county council of their claim under item 1 of the enforcement notice. He further mentioned that as regards item 2 of the notice, the appeal of the county council before the Divisional Court was limited to work done after the date of the resolution. He continued:] It may seem somewhat incongruous that the county council should abandon complaint in regard to user of land for the purpose of a public exhibition known as Bekonscot Model Village, but should still proceed with a demand for the demolition or removal of some of the buildings which have for years been publicly exhibited as and have become known as Bekonscot Model Village. It is found by the justices that since as long ago as August, 1929, members of the public have been admitted to the area, and that by April 1, 1933, the model village was substantially completed. But the task of the court can only be to decide whether the county council has been endowed with

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"a giant's strength"; the court has not the material before it to decide whether "it is tyrannous to use it like a giant."

In my judgment, the work done by the appellants subsequently to the resolution clearly came within the words "works "on land." It is not necessary to seek to define the phrase, or to relate it to any statutory definitions, for I consider that the work done by the appellants came within the phrase "development of estates and building operations" as well as within the word "development," either with its meaning under the Act of 1932 or with its meaning under the Act of 1947.

The next inquiry is whether the "works on land" were carried out "in contravention of previous planning control." In this connexion it becomes necessary to consider section 75 (9). [His Lordship read the subsection and continued:] The words "interim development order" are defined in the Act [section 119 (1)] to mean an order made under subsection (1) of section 10 of the Act of 1932.

If the definition of "interim development order" had included the Order of 1922, then, once it is held that what the appellants did after September 30, 1929, comes within the words "works "on land," the appellants would be without argument. Such works would have been carried out otherwise than in accordance with permission granted under the Orders of 1922 and 1933, for the appellants neither sought nor obtained permission. The question arises whether the appellants are better placed because section 75 (9) refers only to the Order of 1933. In my judgment they are not. The appellants carried out "works on "land." The question must then be posed whether such works were carried out otherwise than in accordance with permission granted under the Order of 1933. As there was no permission granted under the Order of 1933, in my judgment, it follows that the works were otherwise than in accordance with permission granted under that order. It is said that the words should be read as referable only to the period subsequent to the Order of 1933, for it is rightly said that permission under that order could only be obtained after the date of the order. But the words of the subsection are not limited. Certain works on land are "to "be deemed" to have been "in contravention of previous "planning control." This choice of language was probably employed for the reason that, under the Acts of 1919, 1925 and 1932, developers were not under compulsion of applying for interim development permission; they merely ran certain risks for the future if they proceeded to develop without having secured permission. It was consequently enacted by section 75 that certain works on land should be deemed to have been begun "in contravention of previous planning control." The works were so to be deemed if they were begun otherwise than in accordance with permission granted under the Order of 1933. The words, in my judgment, are wide enough, and are apt, to cover works carried out after the date of a resolution to prepare a planning scheme, both before as well as after the date of the Order of 1933. Parliament has in effect enacted that unless there was permission under the Order of 1933 then works, excluding always anything coming within the definition of "existing "buildings," subsequent to a resolution to prepare a scheme, should be deemed to have been carried out in contravention of previous planning control. If in some case permission had in fact been given under the Order of 1922, then, in the unlikely event of a suggestion being made that the words of section 75 (9) would nevertheless apply, the effect of section 54 of the Act of 1932 and of section 113 of the Act of 1947 dealing with repeals and of certain other provisions would have to be considered. It may be that a permission given under the Order of 1922 would be treated as a permission given under the Order of 1933. But this matter does not call for decision, and I express no opinion upon it. I can see no escape from the applicability of section 75 (9) to the present case, and the "works on land" which were carried out after the resolution took effect were carried out other than in accordance with permission granted in that behalf by or under an order made under subsection (1) of section 10 of the Act of 1932. There is no proviso to, or limitation of, the relevant words of section 75 (9) of the Act of 1947, and the result follows that, as the appellants' land was subject to a resolution to prepare a planning scheme, and as "works" were carried out on the land after such resolution, and as no permission for the carrying out of such works was granted under the General Interim Development Order, 1933, the works on land, save so far as they might be within the definition of "existing buildings," must be "deemed" to have been carried out in contravention of previous planning control for the purposes of section 75 (1) of the Act. I, therefore, reach the conclusion that the judgment of the Divisional Court was correct, and that the results must follow which were consequent upon this view.

Lloyd-Jacob J. [after stating the facts:] At the time when the appellants commenced the development of the Bekonscot Model Village and the building operations which were comprised in that development, the provisions of the Town Planning Act, 1925, had not been made to apply to the area. There was, therefore, no planning control in operation to which they had any occasion to conform. The resolution to prepare a town planning scheme passed in September, 1929, brought into operation the provisions of the Act of 1925, whereby the opportunity to seek and obtain permission for further development under the Order of 1922 was provided, an opportunity of which the appellants did not choose to avail themselves.

By section 10 (2) of the Act of 1925, any works, other than those approved under an interim development order, if carried out after the date of the resolution, were excluded from compensation should the powers in section 7 to remove or alter them be exercised when the planning scheme was ultimately approved and adopted, but by proviso (*a*) to subsection (2) there is a special saving for work done, or buildings finished, if begun or contracted for earlier than the relative operative date, which for present purposes is the date of the resolution.

Having regard to the findings of the justices, this would preserve to the appellants a right of compensation in respect of the erections, garden layout and model railway foundations, so far as they were within the red line on the plan, and make it unnecessary for them to seek any permission under any interim development order to carry out such completion. This completion could not, therefore, have been in contravention of previous planning control, for it was impliedly authorized by the then operative statute under which planning was controlled.

The extension of the railway and the erection of model buildings in the area outside the red line if, as is plainly the case, these constitute "development" within the definition contained in section 53 of the Town and Country Planning Act, 1932, were such as to require permission under an interim development order if they were not to be at risk of demolition or alteration without compensation should a scheme, which did not include them, be ultimately approved by the Minister. This construction and erection therefore contravened planning control in the sense that it did not accord with the plans envisaged for ultimate adoption in respect of the locality, but no effective steps to remedy the contravention could be taken by the local authority until the planning scheme received the Minister's approval. This position continued until the Act of 1947 came into operation, which swept away this barrier and provided, by section 23, for enforcement of planning control from the appointed day [July 1, 1948]. Section 75 (1) made the procedure for enforcement operative in respect of antecedent works, if they were carried out in contravention of previous planning control, and section 75 (9) defines such contravention. Two things require to be established: (a) that the land in question was subject to a resolution to prepare a planning scheme; (b) that the works do not conform with permission granted under the Order of 1933. The appellants do not question the facts, and both requirements have been established.

The buildings and erections in the area outside the red line must accordingly be held to be a contravention of previous planning control, and are therefore appropriate for condemnation under the enforcement notice. The consequence of these conclusions may appear unfortunate, in that the continued user of the area for exhibition purposes is no longer challenged and the right to continue to use the buildings within the red line for such purposes cannot be assailed. The mutilation of the present layout by destruction of the remainder would appear to serve no useful purpose to anyone. This, however cogent for consideration by the Minister, is not a matter which concerns the court.

In my judgment, therefore, in the result the order of the Divisional Court should be varied by excluding from the remitted matter any work done or buildings finished after October 1, 1929, which had been begun or contracted for before that date.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate; Sharpe, Pritchard & Co.*

E. D.

MOSES *v.* LOVEGROVE.

[Plaint No. P.G. 361.]

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April 25, 28, 29.

Evershed M.R., Birkett and Romer L.JJ.

Limitation of action—Landlord and tenant—Rent Restriction—No rent paid under weekly tenancy after 1938*—Premises become controlled on September* 1, 1939*—Landlord's title extinguished—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 9 (2), 10 (1).

The defendant was tenant under an oral weekly tenancy and he made his last payment of rent to the plaintiff, his landlord, on May 28, 1938. On September 1, 1939, the premises were brought within the provisions of the Rent Restriction Acts by the Act of 1939. Early in 1952 the plaintiff as landlord sought to recover possession of the premises. The defendant claimed that the plaintiff's title had been extinguished by section 16 of the Limitation Act, 1939. The plaintiff, while admitting that the defendant was in adverse possession from June 4, 1938, to September 1, 1939, contended that such adverse possession then ceased because, as a result of the Rent Restriction legislation, the plaintiff had no right, as of course, to recover possession. The county court judge dismissed the action holding that the plaintiff's title had been extinguished:—

Held, that the plaintiff's right of action accrued in June, 1938, and then there was adverse possession on the part of the defendant. There was nothing in the provisions of the Rent Restriction Acts which altered or qualified the character of the defendant's possession which had begun as adverse possession in 1938 and such adverse possession continued until the present action was started. The test of adverse possession for the purposes of section 10 (1) of the Limitation Act, 1939, was not the existence of an absolute unqualified right to recover possession in the courts on the part of the owner of the property. Possession for the purposes of the Limitation Act, 1939, was none the less adverse because Parliament had put certain serious qualifications upon the right of a person whose land was in adverse possession to enter and recover the possession of that property.

The observations of Collins L.J. in *In re Jolly; Gathercole* v. *Norfolk* [1900] 2 Ch. 616 considered.

Warren v. *Murray* (1894) 2 Q.B. 648 distinguished.

Semble, if by virtue of non-payment of rent or other denial of the landlord's rights, a landlord becomes entitled to invoke the jurisdiction of the court that is a "right of action" within section 4 (3) of the Limitation Act, 1939.

The effect of the provisions of the Rent Restriction Acts where the statutory period of limitation was alleged to have begun to run when a tenant was in possession as statutory tenant, considered, but not decided.

APPEAL from Judge Sir Gerald Hurst Q.C. sitting at Bromley county court.

In 1934 the plaintiff, May Moses, purchased 7 Kent Road, West Wickham, Kent, a dwelling-house within the Rent Restriction Acts. In 1935 she registered the premises as decontrolled, and then informed the defendant, Leslie Lovegrove, the tenant, that the rent of the premises was increased to 10s. 6d. per week. There was no written tenancy agreement but the defendant had the usual rent book. The defendant refused to pay this increased rent and on May 28, 1938, made a last payment of rent. Since that date the defendant had paid no rent. On September 1, 1939, the premises again became controlled.

Early in 1952, the plaintiff sought to recover possession of the premises. The defendant claimed that the plaintiff's title had been extinguished under the provisions of the Limitation Act, 1939.[1] The county court judge accepted that contention and dismissed the plaintiff's action.

The plaintiff appealed.

Heathcote-Williams Q.C. and *J. E. S. Ricardo* for the plaintiff. It is submitted that the county court judge reached a wrong conclusion in holding that the plaintiff's right to recover possession was barred by the Limitation Act, 1939. It is contended, first, that this is a case where there was a lease in writing, because the rent book constituted such a lease, so that section 9 (2) of the Limitation Act, 1939,[1] does not apply. If that is wrong, it is conceded that there was adverse possession from June 4, 1938, to September 1, 1939, but on that date, when this dwelling-house was brought within the scope of the Rent Restriction Acts by the Act of 1939, it is contended that the defendant's possession ceased to be "adverse possession" within section 10 (1) of the Limitation Act, 1939, because the plaintiff no longer had a right to possession. It is necessary here to look not at the defendant's possession but at the plaintiff's right to possession. The plaintiff had no enforceable right to possession: *Warren* v. *Murray*.[2] A right to invite the court to exercise a discretionary power is not a right of action: *Dipple* v. *Dipple*.[3] [He referred to Preston and Newsom on the Limitation of Actions, 2nd ed., p. 71, and *Morrison* v. *Jacobs*.[4]]

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[1] Limitation Act, 1939, s. 4 (3): "No action shall be brought . . . to "recover any land after the expiration of twelve years from the date "on which the right of action "accrued. . . ."

S. 9 (2): "A tenancy from year to "year or other period, without a "lease in writing, shall, for the pur"poses of this Act, be deemed to be "determined at the expiration of the "first year or other period, and "accordingly the right of action of "the person entitled to the land "subject to the tenancy shall be "deemed to have accrued at the date "of such determination."

S. 10 (1): "No right of action to "recover land shall be deemed to "accrue unless the land is in the "possession of some person in whose "favour the period of limitation "can run (hereafter in this section "referred to as 'adverse posses"'sion') and where under the fore"going provisions of this Act any "such right of action is deemed to "accrue on a certain date and no "person is in adverse possession on "that date, the right of action shall "not be deemed to accrue unless and "until adverse possession is taken of "the land."

S. 31 (1): ". . . 'Action' in"cludes any proceeding in a court of "law, including an ecclesiastical "court."

[2] [1894] 2 Q.B. 648.

[3] [1942] P. 65.

[4] [1945] K.B. 577.

Since the Rent Restriction Act of 1939 came into operation the defendant had a right to be in possession and it is not possible to say that his possession was unlawful. His possession could only be adverse to the plaintiff, if the plaintiff was voluntarily abstaining from exercising a right to possession. It is submitted that time ceased to run against the plaintiff on September 1, 1939, and that she is now entitled to an order for possession. [He referred to *Court* v. *Robinson* [5] and *Lougher* v. *Donovan.*[6]]

John Bassett Q.C. for the defendant. It is submitted that a rent book does not constitute a lease in writing. Here there was adverse possession. "Adverse possession" is denial of the owner's title. For example, where there is a lease in writing, payment of rent to a third person is a denial of the landlord's title. If a tenant fails to pay rent, that is a denial of the landlord's title. [He referred to *Doe* d. *Lansdell and Others* v. *Gower* [7]; *Warren* v. *Murray* [8]; *In re Jolly.*[9]]

Evershed M.R. stated the facts and continued:—I can dispose in brief terms of two subsidiary points that emerged during the hearing. It was in the first place suggested and argued in the court below (but in this court Mr. Heathcote-Williams only faintly adumbrated it) that there was here a lease in writing so as to exclude the particular provisions of section 9 (2) of the Limitation Act, 1939. The alleged lease in writing consisted of the rent book, which was put in evidence. The judge rejected the view that the rent book was such a lease in writing within the meaning of the Act, and I think he was entirely right in that conclusion.

The rent book is, I think, what it purports to be, and what it is called, a rent book, that is, a book containing acknowledgments for payment of weekly sums of rent, and containing also, in pursuance of the terms of the legislation, a reference to the conditions on which the tenant was holding his tenancy. I think that on the face of it, it was not intended to be, and is not a contract for granting a tenancy, still less a lease creating an estate. It is, I think, at most what it was intended to be, and what it is on the face of it called, a book evidencing the terms on which the tenant held.

The second matter was this: it was argued in the court below that since the defendant was admittedly the tenant of the plaintiff up to the time when he ceased to pay rent, therefore all his subsequent occupation, albeit without any payment of rent or other acknowledgment, was referable to his having been a tenant of the plaintiff, so that at no stage was he ever in adverse possession of the premises. That point was expressly abandoned by Mr. Heathcote-Williams in this court, and I do not therefore spend further time upon it, for it is now conceded by him that from the expiration of one week after May 28, 1938 (that is, after the last payment of rent) until the impact on these premises of the new Rent Act of 1939, there was adverse possession on the part of the tenant within the meaning of the Limitation Act, 1939.

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[5] [1951] 2 K.B. 60.
[6] [1948] 2 All E.R. 11.
[7] (1851) 17 Q.B. 589.
[8] [1894] 2 Q.B. 648.
[9] [1900] 2 Ch. 616.

But the argument is that, when on September 1, 1939, the premises again were brought within the scope of the Rent Restriction legislation, then by reason of the terms and the effect of that legislation, the adverse possession of the defendant ceased, and ceased for this reason, that thenceforward, by virtue of the Acts, the plaintiff had no right, as of course, to recover possession against the defendant, the tenant. The most that she had, according to the argument, was the right to go to the county court and invoke the exercise in the plaintiff's favour of the discretion vested in the county court judge of granting possession, if he thought it reasonable in all the circumstances so to do. That qualified right, according to the argument, is not such as is consistent with adverse possession on the part of the defendant.

Such a view, if well founded, is, I think, somewhat startling, for it would necessarily follow therefrom that in a case of premises controlled or covered by the Rent Restriction legislation, unless the statutory period under the Limitation Act, 1939, had expired before they came under the control, no Limitation Act could ever run in favour of the tenant, or could ever run at all, so long as the Rent Restriction legislation remains on the statute book.

There is a further reason for thinking such a conclusion surprising, and it was a reason noticed by my brother Romer during the argument: the Rent Restriction legislation is intended to protect tenants. If Mr. Heathcote-Williams is right, it would, in this instance, have the peculiar and oblique effect of preserving to the landlord a right in respect of this property, which she would indubitably, on the argument, otherwise have lost.

[His Lordship read the relevant provisions of the Limitation Act, 1939, and continued:] It is on section 10 (1) that the plaintiff's argument rests, for it is said: although we concede

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that the right of action did accrue in 1938, nevertheless by virtue of the Rent Restriction legislation which became applicable to the premises in September, 1939, thenceforward there ceased to be adverse possession on the part of the defendant. Under the Limitation Act, 1939, in order that the limitation period may run and extinguish the title of the claimant, two conditions must be satisfied: first, a right of action must have accrued at a date (in this case) not less than 12 years before the proceedings, and, secondly, thereafter there must have continued, throughout the intervening period, adverse possession on the part of the person in occupation.

I have said that Mr. Heathcote-Williams has conceded not only that the right of action did accrue in June, 1938, but that until September 1, 1939, there was also adverse possession on the part of the defendant. As a matter of principle, it seems to me prima facie reasonably clear that if the nature of the defendant's possession was adverse possession from June, 1938, to September, 1939, its quality cannot have been altered by the impact of another Act of Parliament designed to give protection to tenants against eviction by their landlords, but having otherwise nothing to do with the purpose and scope of the Limitation Act, 1939.

I think indeed that the fallacy, if I may venture so to describe it, of Mr. Heathcote-Williams' argument lies in the assumption that the test of adverse possession is that it postulates an unqualified right to recover possession throughout the period alleged. I do not find in the section any language to justify that conclusion. Reverting to section 10 (1), that which is called "adverse possession" and defined as such is "land in the possession of some "person in whose favour the period of limitation can run." According to the ordinary sense of it, adverse possession must, I should have thought, be possession adverse to, that is to say, inconsistent with and in denial of the right of the landlord to the premises; and if, as is conceded, during the period from June, 1938, to September, 1939, occupation of the tenant without payment of rent and without acknowledgment constituted such possession adverse to and in denial of the other party's title, I cannot for myself see how it can be said that that situation is altered by the limitations placed by Parliament on the right of a landlord to recover possession of controlled premises under the legislation which then came into operation.

I think the matter may be tested in this way: Mr. Bassett referred us to the case of *In re Jolly; Gathercole* v. *Norfolk.*[10] In that case, which was a case before this court, Collins L.J. used this language in reference to the then statute of 3 & 4 Will. 4, c. 24[11]: "At the end of the 12 years the possession of a tenant "who has paid no rent becomes adverse during the whole time "the adverse possession is validated by the statute, and it is not "competent for the landlord to say that he still retains the right "to recover rent which was not payable to him. I think that is "emphasized by the position of a tenant under a lease for years "as compared with that of a tenant under a lease from year to "year. In the former case the non-payment of rent does not "render the possession of the tenant adverse unless he pays rent "to some person other than the lessor. But in the latter case "the legislature has treated the mere non-payment of rent by a "tenant from year to year as a payment to some person other "than the landlord."

I test the matter by supposing that in this case the defendant had paid the rent, 7s. 9d. or 10s. 6d., or whatever the rent might be, to some person other than the plaintiff, either in the false belief that that other person was the landlord, or, if you will, with the deliberate intention of creating a statutory title in favour of that other person, and in defeasance of the plaintiff's right. In those circumstances, it seems to me extravagant to suggest that payment over this period of rent to some other person was not possession adverse to the plaintiff. The only distinction here is that the defendant did not pay rent to some other person—he did not pay rent to any person at all. But that cannot avail the plaintiff, since it is conceded on his behalf that, apart from the Rent Acts, non-payment of any rent, and the absence of any other acknowledgment, is, within the meaning of the Limitation Act, 1939, possession adverse to the person to whom the rent should have been paid.

The notion of adverse possession, which is enshrined now in section 10, is not new; the section is a statutory enactment of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier Limitation Statutes. I am content to make one reference to the book to which Mr. Heathcote-Williams referred us, Preston and Newsom's Limitation of Actions, 2nd ed., at p. 71, where it is stated: "A right of action "only accrues, and time only runs, if and so long as there is a "person in possession and that person is not disqualified from

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[10] [1900] 2 Ch. 616.

[11] Ibid. 619.

"relying on the statute. Thus, by section 19, a trustee cannot "avail himself of the statute against his beneficiary and the "trustee's possession is not adverse. Again, a beneficiary in "possession does not have possession adverse to the trustees or "his co-beneficiaries." Then later: "A possession may fail to be "adverse by reason of the rule that 'possession is never adverse "'if it can be referred to a lawful title.'"

If the argument had been sustained, or was capable of being sustained, that a tenant retaining possession without paying rent or other acknowledgment was still in possession by virtue of a title referable to his tenancy, then the rest of the argument would be logical. But, in the absence of that first argument, it follows necessarily, as I think, that a tenant in the circumstances of this defendant, apart from the Rent Acts, is in adverse possession within the meaning of section 10, and it seems to me that the Rent Acts are entirely beside the point, and have no bearing on the question we have to decide, whether the statutory conditions of the Limitation Act, 1939, are in this case satisfied.

I would be content to leave it there, but out of respect to Mr. Heathcote-Williams' argument, I will add a few sentences in reference to the proper place which, I think, the Rent Acts have in such a case as this. First, however, I will refer to one passage from the case of *Warren* v. *Murray*,[12] to which Mr. Heathcote-Williams referred us. That was a case in which the person in occupation was there by virtue of a contract to grant him a lease for 99 years, such lease never having been granted. In the absence of the lease he was, of course, in the eye of the law, only a tenant at will, and that tenancy could, in the eye of the law, have been determined at any time, and the owner could have recovered possession. But, having regard to the existence of the contract, it was pointed out that a court of equity would, if asked, necessarily grant an injunction to restrain the owner exercising his legal rights, so that the effect was that the landlord had no right to go to the court and demand possession, and therefore it was said the right of action had never accrued.

In the course of his judgment A. L. Smith L.J. used this language[13]: "It seems to me evident that a person must have "an effective right to make entry and to recover possession of "the land in order that the statute may begin to run. If the "argument for the plaintiff is correct, the trustees are to lose "their property because they did not enter at a time when they

[12] [1894] 2 Q.B. 648.

[13] Ibid. 658.

"really could not enter with any effect, inasmuch as a court of "equity would at once have decreed specific performance and "put an end to any entry they might have made. It seems to "me impossible to hold that this constitutes an entry within the "meaning of the Act. It is, however, said that the plaintiff's "predecessors became tenants at will, and by virtue of section 7 "the statute began to run a year after they were let into possession. I do not so read the section. As in the case of section 2, "it seems to me that section 7 requires that there should have "been an effective right of entry or action before the section can "apply at all. It provides at what time the right of entry or "action shall be deemed to have accrued, but that assumes that "there is a 'right' of entry or action. In this case there was "no such right, and therefore the statute did not run."

Of course, those words were used at a time when such matters as Rent Restriction legislation were not in contemplation, but in any event they have, as I think, no bearing on the present problem. The question there was not whether there was adverse possession, but whether a right of action had ever accrued. In the present case it is admitted that it did, and the only question is whether adverse possession thereafter continued. None of the authorities cited by Mr. Heathcote-Williams is, in my judgment, authority for the proposition that the test of adverse possession is, as he would have it, the existence of an absolute unqualified right to recover possession in the courts on the part of the owner of the property.

We are not concerned with what the situation would be if, at the time the statutory period of limitation was alleged to begin to run, the premises were under the control of the Act, so that at that date the only right the landlord had would be the right to invoke the jurisdiction of the county court. If such were the circumstances, then the question no doubt would arise whether there was a right of entry, a right of action within the meaning of section 4 and section 9 by virtue of the qualifications put upon that right by the Rent Restriction legislation. As I have said, we have not to decide that question, but I must not be taken in any way to indicate the view that, if such were the facts, the right of action within the meaning of this Limitation Act, 1939, would not arise because of the qualifications imposed on the rights of a landlord by the Rent Restriction Acts.

An action is defined in section 31 (1) of the Limitation Act, 1939, as including any proceeding in a court of law. If, by virtue of non-payment of rent or other denial of the landlord's rights, a landlord becomes entitled to invoke the jurisdiction of the court, then it seems prima facie, though I express no final view on the matter because it is unnecessary, that the "right "of action" within the meaning of the Limitation Act, 1939, would cover a right to go to the county court and invoke the county court's jurisdiction. But I must also not be taken to suggest that in a case such as the present, if, after, say, nine or ten years of occupation on the part of a tenant without paying rent, without any acknowledgment of the landlord's title and in denial of any rights on the part of the landlord, a landlord then tries to recover possession, the defence on the Rent Acts would be open to the tenant, or that he could, in such circumstances, successfully contend that the dwelling-house was a dwelling-house let at all, or subject to a letting within the meaning of the Rent Act. That again is unnecessary to decide, but assuming that, as a practical matter, and certainly it would be a correct assumption if proceedings were taken shortly after the occupant ceased to pay rent, it would be necessary to satisfy a court that it was reasonable to make an order, still it does not seem to me that that consideration assists the defendant in the present case.

Possession, as I have said, for the purposes of this Limitation Act, 1939, is none the less adverse, because Parliament has thought fit to put certain serious qualifications upon the right of a person whose land is in adverse possession to enter and to recover the possession of that property. After all, in order that the tenant or the occupant may invoke the Rent Acts at all, he must assert the tenancy, either a contractual tenancy or a statutory tenancy; it obviously would not lie easily in the mouth of a tenant to assert an actual contractual tenancy, if for years and years he has paid no regard whatever to any of the terms of the contract he alleges. The same, I think, would apply to a statutory tenancy, seeing that by section 15 of the Rent Restriction Act of 1920 conditions of the statutory tenancy are defined thus: "A tenant who by virtue of the provisions of this "Act retains possession of any dwelling-house to which this Act "applies shall, so long as he retains possession, observe and be "entitled to the benefit of all the terms and conditions of the "original contract of tenancy. . . ." A tenant or occupant, who observes none of the terms and conditions of the original contract of tenancy, prima facie would be in difficulty in asserting that he was a statutory tenant.

Of course, if the period of non-payment is short, the tenant could (as frequently happens in cases in the courts) allege that he was there by virtue of the tenancy, and admit that he therefore owed a certain amount of rent which he had neglected to pay. It is, however, unnecessary to pursue this matter further. For the reasons I have indicated, I think there was here undoubtedly the accrual of a right of action in May or June, 1938, and so much is admitted. I think it equally clear that there was then adverse possession on the part of the tenant, the defendant, and I cannot see anything, in the impact of the Rent Acts or otherwise, which qualifies or alters the character of the possession which had begun as adverse possession, and I think continued as adverse possession until the proceedings in the present case were initiated. I therefore think that the learned judge rightly concluded the matter in favour of the defendant, and I would dismiss the appeal.

Birkett L.J. I am of the same opinion. The possession of the defendant continued to be adverse on the passing of the Act of 1939. I agree that this appeal should be dismissed.

Romer L.J. I also agree, and there is very little I would like to add. The defendant's former tenancy was quite plainly an oral weekly tenancy, although it was rather faintly sought to be argued that it was a tenancy under a lease in writing, but my Lord has disposed of that in language with which I entirely agree. The tenancy was quite obviously an oral weekly tenancy, with the result that time started to run by virtue of section 9 of the Limitation Act, 1939, from one week after the last payment of rent, which was on May 28, 1938. As no notice to quit was given, the tenant could not thereafter be said to be in immediate adverse possession in the ordinary sense, for he remained on under his contractual tenancy. Nevertheless, for the purposes of the Limitation Act, 1939, his tenancy ceased to exist, and therefore he is deemed to have remained on in adverse possession. Accordingly, the fact that for some purposes his contractual right remained in the absence of a notice to quit or a writ for possession is irrelevant, as also is the precise date on which the lessor could properly have started proceedings in ejectment. The point is that after the expiration of one week from the date of the last payment of rent, the defendant is deemed to have had no contractual right to possession, and therefore to have been a trespasser or a squatter.

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Why should he be regarded as being in possession by virtue of permission or grant of the owner merely because of the passing of the Rent Act of 1939? That Act gave him no contractual right to possession; it created no contractual tenancy. By reason of the Act, the plaintiff could not eject him without an order of the county court, but that is merely a barrier in the way of the plaintiff's right of action for possession, and it conferred no title on the defendant so as to convert what was formerly deemed to be adverse possession into permissive possession or possession as of right.

The cases which were cited to us, for example, *Warren* v. *Murray*,[14] to which my Lord has referred, do not, in my opinion, assist the plaintiff's claim, because in those cases the owner could not evict the occupier in question, inasmuch as the latter, the occupier, had some legal or equitable right derived from the owner entitling him to remain in occupation. Mr. Heathcote-Williams argued before us that the test of adverse possession is whether the owner has an unqualified right to sue for possession; if he has not that right, then, he said, the occupation cannot be regarded as adverse. The fact that in the cases this has been in some sense treated as the test, does not render the test exhaustive, because usually the two things are co-extensive, that is to say, if the owner has given a contractual right or permission to occupy, then he cannot bring an action for eviction, and vice versa. It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings.

In the present case, for the purposes of the Limitation Act, 1939, the defendant had no such derivative right from the plaintiff between May 28, 1938, when he last paid rent, and September 1, 1939, and he acquired no such right on the latter date, because the statutory protection afforded by the Act does not constitute a title referable to or emerging from the owner. So far as the owner is concerned, it in fact conferred no title to possession at all; it merely provided in some degree a defence to a claim for possession.

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[14] [1894] 2 Q.B. 648.

For these reasons, which are in effect substantially the same as those which my Lord has given, I agree that this appeal fails.

Appeal dismissed.

Solicitors: *David Morris & Co.; Piper, Smith & Piper.*

B. A. B.

STEWART *v.* REAVELL'S GARAGE.

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Mar. 4, 5, 6, 7;
Apr. 7.

Sellers J.

Contract—Work done and materials supplied—Repair of motor car—Specialist's work done by sub-contractors with consent of owner—Defective work by sub-contractor—Unsuitable materials—Reliance on repairer's skill and judgment—Liability of repairer—Warranty of fitness for intended purpose.

There can be implied into a contract for work done and materials supplied in repairing a motor car an absolute warranty of fitness for the intended purpose of the work, if the circumstances show that the work of repair was of the type which the repairer held himself out to perform, either by himself or his sub-contractors, and that the purpose was made known to the repairer in such a way as to show that the customer relied on the repairer's skill and judgment. The standard of proof in such a case is the same as that in the case of a contract for the sale of goods (see section 14 of the Sale of Goods Act, 1893), and the repairer is liable for defective work on the part of his sub-contractor, even if the customer consented to the work being done by that particular sub-contractor, unless the customer, without placing reliance on the skill and judgment of the repairer, selects a particular sub-contractor by whom the work is to be done.

Where, therefore, a customer who took a motor car to a firm of motor repairers to have the braking system repaired agreed, on the recommendation of the repairers, that certain parts of the brakes should be sent to a particular specialist for relining, and the car was subsequently damaged in an accident due to the unsuitable linings fitted and faulty work carried out by the specialists:—

Held, that the customer relied on the repairers to repair the brakes of the car in a suitable and efficient manner, and that it was the duty of the repairers to provide good workmanship, materials of good quality and a braking system reasonably fit for its purpose. The repairers, therefore, were liable to the customer for the faulty work of their sub-contractor.

G. H. Myers & Co. v. *Brent Cross Service Co.* [1934] 1 K.B. 46 applied.

ACTION.

The plaintiff was the owner of a 1929 model Bentley motor-car which in June, 1950, he took to the defendants' garage to have the braking system repaired. To repair the brakes it was necessary to reline the inner surface of each of the brake drums as well as to renew the Ferodo lining of the brake shoes. The relining of the drums was specialist's work which, to the knowledge of the plaintiff, the defendants did not undertake. The plaintiff suggested that it should be done by a firm who advertised cast iron liners for Bentley brake drums, and the defendants obtained a quotation from this firm which they communicated to the plaintiff. Both the plaintiff and the defendants considered that the price quoted was too high and the defendants suggested that a quotation be obtained from another firm, Relined Brake Drums Ld., who normally did this work for them. Relined Brake Drums Ld. referred the defendants to their price list and pointed out that they advocated the fitting of an alloy steel liner; their estimate was considerably less than that of the first firm. The plaintiff called at the defendants' garage and, during an interview with the defendants, the defendants, in substance, advised and recommended that Relined Brake Drums Ld. should do the work, and the plaintiff agreed without knowing that the liners supplied by that firm would consist of a strip metal sleeve with a weld. The work on the brake drums was carried out by Relined Brake Drums Ld. as sub-contractors of the defendants, and the defendants re-assembled the brakes, tested them and delivered the car to the plaintiff.

The brake drums on a Bentley car of this particular model are larger and less rigid than most other brake drums, and only a liner consisting of a cast iron tube or continuous metal sleeve without a weld is satisfactory; although suitable for other cars, a liner of strip metal with a weld is liable to "bulge," i.e., to become detached from the metal of the drum, if fitted to a Bentley brake drum.

The sub-contractors fitted strip metal liners with a weld to the brake drums of the plaintiff's car, and they did not fit the liner to the front off-side drum properly so as to obtain a good and permanent fit, and, without the defendants' knowledge, part of that liner became detached when the brakes were tested. As a result, the day after the defendants had delivered the car to the plaintiff, when the plaintiff was driving at about 60 miles per hour and applied the brakes gently, the car vibrated, swung quickly to the right and, notwithstanding the plaintiff's efforts at steering and braking, mounted the off-side of the road, struck a tree, overturned and was damaged.

The plaintiff brought an action against the defendants claiming £361 17s. 6d. damages, the cost of repairing the car and supplying the necessary parts, alleging breach of contract and negligence on the part of the defendants in the repair of the motor-car in that, among other things, they fitted or caused or allowed to be fitted to the brake drums liners made of strip metal which were unsuitable for use on a Bentley motor-car of this model.

R. T. Monier-Williams for the plaintiff.

P. M. O'Connor for the defendants. The accident occurred as a result of faulty work for which the sub-contractors and not the defendants were responsible. There was either a sub-contract by the plaintiff with Relined Brake Drums Ld. or a "complex "contract" as described by Tucker L.J. in *Edwards* v. *Newland & Co.*[1] The duty imposed on the defendants by this contract is an implied duty to take care, but that implication is excluded in respect of any part of the work which it was agreed should be carried out by someone else. It is submitted that there is a term in this type of contract which makes it impossible to imply into the relationship of customer and garage proprietor a term that the proprietor will carry out the work in any particular manner. Had the defendants said that they would have to send the car away their liability for the work would have been excluded but not their liability for choosing a good specialist; that, however, is not the position because the specialist was chosen by the plaintiff and, although the brake drums were sent to that particular specialist on the defendants' recommendation, they were sent with the plaintiff's express consent. [*Randall* v. *Newson*[2]; *Edwards* v. *Newland & Co.*[3] and *G. H. Myers & Co.* v. *Brent Cross Service Co.*[4] referred to.]

It is submitted that where a contractor, by express agreement, sub-contracts a part of the work, there is no implied term in the. contract that he remains responsible for the care and skill of the sub-contractor. In the present case at no time was it ever contemplated that the defendants would carry out the resleeving of the drums themselves and, therefore, in order to succeed the plaintiff must show facts proving that he relied on the care and skill of the defendants to see that the sub-contract was properly carried out. Those facts do not exist in the present case and the highest that the contract can be put against the defendants was that they owed a duty of care to see that the brake drums were in good order when they came back from the specialists.

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[1] [1950] 2 K.B. 534, 540.

[2] (1877) 2 Q.B.D. 102.

[3] [1950] 2 K.B. 534.

[4] [1934] 1 K.B. 46.

Other cases concerned with sub-contracts where there were written contracts are of no assistance here because to impose liability on the defendants it is necessary to imply terms in the contract. *Dodd* v. *Wilson*[5] can be distinguished on the facts and the same consideration did not apply in *Davies* v. *Collins.*[6] In the case before the court the plaintiff gave express instructions that the work should be done by Relined Brake Drums Ld.; *Davies* v. *Collins*[6] applies only where it can be shown that reliance is placed on the contractors' care and skill for the whole of the work. In every case it is a question of what the contract between the parties actually was: see *Edwards* v. *Newland & Co.*,[7] where Denning L.J. said[8]: "It all depends on the circumstances of "the particular case." The test is whether the contract was one where the plaintiff relied on the care and skill of the defendants to see that the sub-contractors carried out the work skilfully; it is submitted that there was no term to that effect in this contract and that the defendants cannot be held liable for work carried out by the sub-contractors.

R. T. Monier-Williams in reply. The plaintiff's claim might have been founded in contract or tort or both. If it had been founded in tort the plaintiff could have alleged negligence in carrying out the work against the present defendants; if the defendants had said that they had procured supplies from a reputable firm and had no reason to suppose them inadequate, that might have been an answer in tort. It is not an answer to a claim founded in contract.

This is a contract for work and labour and there is an implied term or warranty that materials of good quality suitable for the purpose for which they are intended will be used. There are special circumstances, of which the defendants were aware, in that a car of this type requires an accurate and powerful braking system. In *Maclenan* v. *Segar*[9] the facts were different but it was held that there was an implied warranty resulting from a contract to pay that premises were as safe as reasonable care and skill could make them. There is a similar warranty here; the plaintiff relied on the defendants' care and skill and the remarks of du Parcq J. in *G. H. Myers & Co.* v. *Brent Cross Service Co.*[10] are applicable.

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[5] [1946] 2 All E.R. 691.

[6] [1945] 1 All E.R. 247.

[7] [1950] 2 K.B. 534.

[8] Ibid. 542.

[9] [1917] 2 K.B. 325.

In the present case the plaintiff had never before heard of Relined Brake Drums Ld.; he relied on the defendants to select suitable sub-contractors. There was no stipulation as to whom the work should be sent and the plaintiff consented to it being done by those sub-contractors on the defendants' recommendation. There is, therefore, nothing to exclude the usual proposition that the work done and materials used will be fit and suitable for the intended purpose. The defendants cannot slide out of their liability unless they can say that they did exactly what the plaintiff told them. Negligence is not pleaded and does not enter into the matter; all that the plaintiff need establish is that the brake drum linings were not suitable, because there was an implied warranty that they would be suitable for their intended purpose.

Cur. adv. vult.

April 7. SELLERS J. stated the facts substantially as set out above and continued:—The sub-contractors are not parties to this action, but Mr. Catt, one of their directors, gave evidence. On the facts as I see them I do not think the defendants would have any difficulty in establishing a breach of contract by the sub-contractors, on the ground that they fitted the lining of the off-side front drum so unskilfully that in use it immediately became detached in one part and made dangerous the braking system of which it was known to be a part.

The more difficult question and the relevant one is the liability of the defendants. This depends on the terms expressed or implied of the contract and must be determined on their true effect. This was not a contract for the sale of goods to which section 14 of the Sale of Goods Act, 1893, could be applied. It was a contract for work done and materials supplied. Into such a contract there may also be implied an absolute warranty of fitness for the intended purpose, if the circumstances show that the particular purpose is made known to the repairer and that the work of repair is of the type which the repairer holds himself out to perform either by himself or others as his sub-contractors and, no less important, if the circumstances show that the purpose was made known so as to show that the customer relied on the repairer's skill and judgment in the matter.

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[10] [1934] 1 K.B. 46.

I would adapt to such a contract some words of Lord Wright which state the standard of proof in a case of the sale of goods in *Cammell, Laird & Co. Ld.* v. *Manganese Bronze and Brass Co. Ld.*[11] The standard of proof is equally applicable to the present case. Such a reliance must be affirmatively shown. The customer must bring home to the mind of the repairer that he is relying on him in such a way that the repairer can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation.

There is a passage in the judgment of du Parcq J. in *G. H. Myers & Co.* v. *Brent Cross Service Co.*[12] which provides a concise statement of the law applicable: "I think that the true view is "that a person contracting to do work and supply materials "warrants that the materials which he uses will be of good quality "and reasonably fit for the purpose for which he is using them, "unless the circumstances of the contract are such as to exclude "any such warranty. There may be circumstances which would "clearly exclude it. A man goes to a repairer and says: 'Repair "'my car; get the parts from the makers of the car and fit them.' "In such a case it is made plain that the person ordering the "repairs is not relying upon any warranty except that the parts "used will be parts ordered and obtained from the makers. On "the other hand, if he says: 'Do this work, fit any necessary "'parts,' then he is in no way limiting the person doing the "repair work, and the person doing the repair work is, in my "view, liable if there is any defect in the materials supplied, even "if it was one which reasonable care could not have discovered."

The present case does not fall precisely under either of the classes the judge enumerated. If the plaintiff's first suggestion had been accepted and adhered to, and those sub-contractors had done the work, then I think it would have been very much the same as saying "Get the parts from the makers of the car," and the facts would have negatived any reliance by the plaintiff on the defendants' skill and judgment in respect of the lining to the brake drums.

The particular purpose of the work which the plaintiff contracted to have done was obvious—it was the very object of the arrangement—namely, to be provided with an efficient braking system for his Bentley car, which was a car specially designed for speed and which therefore required a braking system adequate for such speeds as were in contemplation. The size and type of drums, I understand, themselves indicated a powerful braking system. The question arises whether this purpose, made known, as it was, to the defendants, was made known to them so as to show that the plaintiff relied upon their skill and judgment.

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[11] [1934] A.C. 402, 423.

[12] [1934] 1 K.B. 46, 55.

I find that the effect of what was said and done when the parties entered into the contract was that the plaintiff did rely on the defendants as experienced repairers to repair the brakes of the Bentley in a suitable and efficient manner and it was left to them to obtain suitable sub-contractors to do the lining of the drums and to arrange for a suitable type of drum lining to be fitted. The plaintiff's original request for a cast iron sleeve—that is a sleeve without a weld—was not carried out. The defendants and not the plaintiff substituted for that a strip metal sleeve with a weld and, although some mention of the Relined Brake Drums Ld.'s quotation was made known to the plaintiff, more particularly as to price, he was not informed that this sleeve involved a weld. Once the defendants departed from the plaintiff's suggestion of a cast iron sleeve, the type of lining was a matter within their province or sphere as repairers. It was their duty, in the circumstances, to provide good workmanship, materials of good quality and a braking system reasonably fit for its purpose, and they failed to do so by reason of the faulty off-side front brake drum liner. In fact, though unwittingly, the defendants handed over to the plaintiff a highly dangerous vehicle. The faulty liner, in my opinion, caused the accident and the damage to the plaintiff's car, and the plaintiff is therefore entitled to recover damages in this action.

Counsel for the defendants sought to apply to this case the reasoning of Tucker L.J. in *Edwards* v. *Newland & Co.*,[13] and to allege that this was a complex contract where the defendants would be liable for such work as they did themselves if it were faulty, but with regard to work which it was known, indeed intended, would be sub-contracted, they were only under a duty to take reasonable care to employ suitable sub-contractors and were not to be liable for their default and were entitled to assume without further detailed examination that their work would be satisfactory. The case of *Edwards* v. *Newland & Co.*[13] was a case of the storage of furniture for reward, and the furniture was stored elsewhere than in the defendant's premises without the knowledge of the plaintiff, the bailor and owner of the furniture. As the defendant had never fulfilled his obligation to be a bailee

[13] [1950] 2 K.B. 534.

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for storage, he was held to have been in breach of his contract ab initio. I do not find it possible to apply similar considerations to the facts of this case, which are so essentially different.

I would add that I have considered also the other authorities referred to on behalf of the defendants, but I do not regard them as sufficiently relevant to call for further examination.

Judgment for the plaintiff.

Solicitors: *W. A. Sando, Parrott & Co.; Joynson-Hicks & Co., for W. Davies & Son, Woking.*

J. F. L.

CURTIN *v.* CURTIN.

1952
May 9.

Lord Goddard C.J., Jones and Parker JJ.

Husband and Wife—Maintenance order—Husband living with wife in her house—Wife's leave and licence for him to do so—Separate domestic arrangements—" Resides with "—Order of no effect—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1 (4).

Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, provides that a maintenance order made under the Summary Jurisdiction (Married Women) Act, 1895, shall not be enforceable " whilst the married woman with respect to whom the order was made resides with her husband," and shall cease to have effect if for a period of three months after the making of it the married woman continues to reside with her husband.

Held, that a wife who, for more than three months after the making of a maintenance order, permitted her husband to continue living in a house which she herself owned and inhabited, was residing with him within the meaning of section 1 (4) of the Act of 1925, and that accordingly the maintenance order had ceased to have effect.

Evans v. *Evans* [1948] 1 K.B. 175 and *Wheatley* v. *Wheatley* [1950] 1 K.B. 39 applied.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Wealdstone a wife preferred an information against her husband alleging failure by him to pay her money under a maintenance order which had been made against him.

At the hearing of the information the following facts were proved or admitted: On January 31, 1951, a court of summary jurisdiction sitting at Hendon made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, against the husband on the ground of his wilful refusal to provide reasonable maintenance for his wife. The order provided for the payment of £2 weekly to the wife. On May 9, 1951, the husband was in arrear to the extent of £26 11s. under the order. Between January 31 and May 9, 1951, husband and wife were living in the same house, but not as man and wife. The husband paid nothing for his board and his daughter looked after him. He had his own ration book but made no use of it, as he took most of his meals out of the house. The wife supplied food for the household other than the husband, who on occasions helped himself to food in the house against the wife's wishes. The house belonged to the wife, who had not tried to turn the husband out lest she be guilty of desertion in so doing. The husband shared a bed with his brother, who was a lodger, and his daughter kept their room clean. The wife consented to that arrangement in the sense that, as she was under an obligation to provide her brother-in-law with reasonable services, it was impossible to look after the brother-in-law without also helping her husband.

It was contended on behalf of the husband that, as the parties were living under the same roof, the order had ceased to have effect and that the words "resides with" in section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925,[1] must be construed according to their ordinary meaning.

On behalf of the wife it was contended that the husband's insistence upon residing in the wife's house was with the object of defeating the effect of the order; that it was the wife's house by ownership and that the husband was residing with her and not she with him; and that the words of the section were not "reside together."

The justices were of the opinion that the wife was not residing with her husband, as they considered that section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, was limited in its operation to a wife who continued to live with her husband and did not apply where a husband continued to reside with his wife. They accordingly held that the order of January 31, 1951, was enforceable, and committed the husband to prison for three months in default of payment of the arrears, suspending the operation of the committal until the hearing of the husband's appeal.

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[1] Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4): "No order made under the "principal Act shall be enforceable "and no liability shall accrue under "any such order whilst the married "woman with respect to whom the "order was made resides with her "husband, and any such order shall "cease to have effect if for a period "of three months after it is made the "married woman continues to reside "with her husband."

L. I. Stranger-Jones for the husband. The committal order cannot stand as the maintenance order is no longer enforceable. The cases show that residence of husband and wife under the same roof, even though the spouses are at arms' length, will invalidate a maintenance order if it continues for three months after the making of the order: *Evans* v. *Evans* [2] and *Thomas* v. *Thomas*.[3] The only new matter in *Wheatley* v. *Wheatley* [4] was that the court pointed out [5] that, if a wife could remain in the same house as the husband and yet have a maintenance order enforceable in her favour, she would be getting a double benefit. In *Harris* v. *Harris*,[6] where husband and wife were joint tenants of a house, the court held that residing within the meaning of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, meant living in the same house, whether on good terms or bad.

It makes no difference that the house belonged to the wife. The husband was undoubtedly residing with the wife and the opposite is equally true, that she was also residing with him within the meaning of section 1 (4) of the Act of 1925.

Charles Lawson for the wife. There is no authority concerning facts similar to those now in question; the cases which have been cited are those where a wife has continued to reside in her husband's home after the making of the order. In the present case the home is the wife's and she cannot be said to reside with her husband because it is he who is residing with her, and she disapproves of his doing so.

[LORD GODDARD C.J. If the wife had told the husband to leave her house, different considerations might arise.]

She has not done so for a particular reason, even though it may be a mistaken one. The justices have found that she did not wish him to continue living in her house, and that is tantamount to telling him to leave the house.

[PARKER J. But he is in her house with her leave and licence.]

The words of section 1 (4) of the Act of 1925 are "if . . . the "married woman continues to reside with her husband" and not "if the parties reside together." There is a difference in the two propositions and here the wife was not residing with the husband; it was he who resided with her. In *Evans* v. *Evans* [7] Lord Goddard C.J. was prepared to assume that one spouse could desert the other while living under the same roof: see *Powell* v. *Powell*.[8] It would be strange if the wife here could get an order on the ground of her husband's desertion while under the same roof, as desertion has always been regarded as a greater offence than wilful neglect to maintain. A husband should not be allowed to take advantage of a situation which he has himself created through his refusal to maintain the wife and to leave the house. The whole purpose of section 1 (4) was to prevent a wife from getting a double benefit, which is not the case here.

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[2] [1948] 1 K.B. 175.

[3] [1948] 2 K.B. 294.

[4] [1950] 1 K.B. 39.

[5] Ibid. 43.

[6] [1952] W.N. 83.

LORD GODDARD C.J. [after stating the facts]:—The difficulty in these cases is the wording of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It is unnecessary to repeat what has been said by the court in *Evans* v. *Evans*,[9] *Thomas* v. *Thomas* [10] and *Wheatley* v. *Wheatley*.[11] The only difference between this case and that of *Evans* v. *Evans* [12] is that whereas in *Evans* v. *Evans* [12] the house was the husband's, and the husband was ordered to support his wife who insisted on living in his house, in this case after the husband had been ordered to support his wife she has continued to allow him to reside in her house.

The wording of the Act is that the order shall have no effect "whilst the married woman with respect to whom the order was made resides with her husband,"—be it noted that the words are "resides with her husband"—"and any such order shall cease "to have effect if for a period of three months after it is made "the married woman continues to reside with her husband." If, therefore, she was residing with her husband at the time the order was made and continues to reside with him for three months after that, the order automatically comes to an end, and in the opinion of the court that is what has happened here.

The justices have sought to draw a distinction here because they thought that the Act of 1925 applied to a married woman residing with her husband, and not where a husband resided with his wife. That is too subtle a distinction for me. If a husband resides with his wife, the wife resides with her husband, and vice versa. In the present case the parties are, no doubt, living at arms' length; but they still are living together, under the same roof. The Divisional Court in *Evans* v. *Evans*,[12] and later in *Wheatley* v. *Wheatley*,[13] pointed out that the words of the Act had to be given their ordinary meaning, and the court thought that it could not be said that the parties did not reside together when they were living in the same house together. Here the justices find that for a mistaken reason the wife has never asked her husband to leave the house. Under this Act she could have obtained an order whilst she was still living with the husband, and immediately have told him to leave the house, bolting the door against him if he did not; or she might have taken proceedings in the county court or, in case of trouble, she might have obtained the assistance of a policeman. But she never asked him to leave, and her reason for not doing so is immaterial.

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[7] [1948] 1 K.B. 175.

[8] [1922] P. 278.

[9] [1948] 1 K.B. 175.

[10] [1948] 2 K.B. 294.

[11] [1950] 1 K.B. 39.

[12] [1948] 1 K.B. 175.

The position is that ever since she obtained the order her husband has been living in her house by her leave and licence. If she withdrew the leave and licence and told him to go, and he refused, so that he became a trespasser, very different considerations would arise, and it might well be that the court in such circumstances would not regard the parties as living together, since it would be very difficult to say that a householder was residing with a trespasser who was on the premises against the householder's will.

It is abundantly clear that the wife has never requested the husband to go. He is therefore still there with her leave and licence. In my opinion, therefore, she is still residing with him, the decisions in *Evans* v. *Evans*[14] and *Wheatley* v. *Wheatley*[15] apply, and the maintenance order is without force. The wife is not without remedy: she can either take proceedings in the divorce court or she can tell the husband to go. If he does not go, she can then, no doubt, obtain another order from the justices.

For the reasons which I have given, I think that the committal order cannot stand because the maintenance order has come to an end. Although I appreciate the justices' reasons, this court cannot give effect to the order under appeal.

JONES J. I agree.

PARKER J. I agree.

Appeal allowed.

Solicitors: *H. R. Hodder & Son; E. P. Hanney.*

S. C.

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[12] [1948] 1 K.B. 175.

[13] [1950] 1 K.B. 39.

[14] [1948] 1 K.B. 175.

[15] [1950] 1 K.B. 39.

REISS v. WOOLF.

[1952 R. No. 1648.]

C. A.

1952
May 29.

Somervell, Jenkins and Morris L.JJ.

Practice and Procedure—Pleading—Particulars—Order that particulars of defence be delivered not later than specified time and in default paragraphs of defence be struck out—Particulars delivered within specified time but not sufficient to comply with order—" Default "—Whether referring to time for compliance with order or to sufficiency of particulars—Whether paragraphs automatically struck out—R. S. C., Ord. 19, *r.* 7.

In an action for money alleged to be payable under an agreement, which was not admitted by the defendant, the master made an interlocutory order that the defendant should " not later than four " o'clock in the afternoon of the 21st day following the date hereof, " deliver . . . further and better particulars of his defence, and that " in default thereof paragraphs 2 and 3 of the defence should be " struck out." The defendant delivered further particulars within the stipulated period, but it was contended that they were not a full compliance with the order, the defendant stating, with respect to some of the matters covered by the order, that he was unable to give dates or details until after discovery, or possibly not at all. Thereupon, the plaintiff, on the assumption that paragraphs 2 and 3 of the defence were automatically struck out, applied to have the action transferred to the Short Cause List. The master refused the application and on appeal to him in chambers Devlin J. upheld the master's decision. On appeal:—

Held, (1) that the order of the master was a time order and particulars having been delivered within the stipulated period there had been no default and the paragraphs were not automatically struck out; (2) that if " default " meant default in the sufficiency of the particulars the event was not defined with the necessary precision and therefore the order was inoperative.

Principles formulated by Greene L.J. in *Abalian* v. *Innous* [1936] 2 All E.R. 834, 838 applied.

Decision of Devlin J. affirmed.

Appeal from Devlin J.

In an action by the plaintiff claiming from the defendant £1,000, which it was alleged the defendant had agreed in certain letters to pay, in full settlement of previous claims, the defendant was given leave to defend. In his defence the defendant, by paragraph 1, admitted the sending of the said letters but denied that they constituted an enforceable agreement. By paragraph 2 he alleged that if, looking at those letters, an agreement could be found, it was unenforceable because it was tainted with illegality, being in connexion with the purchase of utility

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goods in excess of the controlled price, or, alternatively (paragraph 3), that the agreement to pay was in connexion with money lent by the plaintiff to the defendant's son and not recoverable under the Gaming Acts.

The plaintiff, being unable to obtain satisfactory particulars from the defendant, took out a summons before a master for an order for particulars, and obtained an order in the following form: "That the defendant do, not later than 4 o'clock in the "afternoon of the 21st day following the date hereof, deliver to "the plaintiff's solicitors the undermentioned further and better "particulars of his defence and that, in default thereof, para-"graphs 2 and 3 of the defence be struck out."

Within the time stipulated further particulars were delivered, but with respect to many matters covered by the order the defendant replied that he was unable to give dates or details until after discovery, or possibly not at all. In those circumstances the plaintiff applied to the master for an order that the defendant not having complied with the order of the master, and paragraphs 2 and 3 of the defence having automatically been struck out pursuant thereto, the action should be transferred to the Short Cause List. The master refused the application, and on appeal to him in chambers Devlin J. also refused to make an order. The plaintiff appealed.

M. Waters for the plaintiff.
B. Finlay for the defendant.

The arguments sufficiently appear from the judgment.

Somervell L.J., having stated the facts, continued:—It is clear, from an authority which was quoted to us and which was referred to by the judge, that there is power to make a condition of the kind made by the master in ordering further and better particulars. Within the times stated, further and better particulars were delivered. They are undoubtedly both further and better, but also undoubtedly, with respect to many matters covered by the order, the defendant says that he is unable to give dates or details until after discovery, or possibly not at all. That having happened, the plaintiff took out an application "for "an order that the defendant, not having complied with the "order of Master Clayton, dated the 8th day of February, 1952, "and paragraphs 2 and 3 of the defence having been struck out "pursuant thereto, this action be transferred to the short cause "list." The master refused to make an order. The judge also refused to make an order, and the plaintiff appeals to this court.

When the matter came before the judge in chambers he adjourned it into court, and we have the advantage of a transcript of his considered judgment. As he said (and I respectfully agree), the first question is: What does this order mean? Mr. Waters, on behalf of the plaintiff, submits that paragraphs 2 and 3 are automatically struck out unless every particular ordered by the order is given, possibly subject to de minimis; that if, in respect of some matter on the one head or the other, the defendant does not give the particulars, and says he is unable to do so until after discovery, or that he has no record of dates, and so forth, then paragraphs 2 and 3 are automatically struck out. It follows that although his clients have not taken that course here, the matter might go to trial, and when the case was called on, the defendant, thinking that the plaintiff had been satisfied with the further and better particulars, might find that, unknown to him, the paragraphs of the defence on which he hoped to rely had been struck out.

The judge did not take that view of the order. He referred to a passage from the judgment of Greene L.J. in *Abalian* v. *Innous*.[1] That was an appeal dealing with the dismissing of an action. I agree with the judge that the same principle applies to an order striking out what are, or may be, the material paragraphs in the defence. The court in that case came to the conclusion that such orders must be absolutely and perfectly precise in their terms and, unless they were so, they were inoperative. Devlin J., applying that principle, said this: "If "'default' means default in the sufficiency of one or more of "the answers I should not consider that the event was defined "with precision; whether or not it had taken place might be "the subject of a genuine conflict of opinion which could only "be resolved by further adjudication. If I thought this to be "the right construction of the order I should follow *Abalian* v. "*Innous*[1] and treat it as inoperative. The order can conform "with the principle in that case only if it is treated as an order "that is dealing with the time of compliance rather than with "the mode of compliance. The order does fix a time very "precisely, and I think it can and should fairly be construed as "a time order. So construed, 'default' refers to default in the "delivery of a document within the specified time. I do not,

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[1] [1936] 2 All E.R. 834, 838.

"of course, mean that any document with writing on it will do. "It must be a document made in good faith and which can "fairly be entitled 'particulars.' It must not be illusory; that "is the word used by Mr. Bankes in argument in *Davey* v. "*Bentinck*.[2] That is the test, in my judgment, and not, as the "plaintiff contends, whether each demand for particulars has "been substantially met. Applying that test, I think there has "been no default."

Then the judge refers to the other courses which are open in this case to the plaintiff if the particulars are, in fact, insufficient. I have read that passage because it expresses my own opinion as to the construction of this order, and I could not, myself, put it in clearer or more precise terms. For these reasons I think the appeal should be dismissed.

The judge also went on to deal with a question which was argued before him, namely, whether under an order of this kind the paragraphs are struck out automatically or whether there has to be a fresh application. On that matter he accepted the contention for the plaintiff. So far, at any rate, as a complete failure to comply is concerned, I would agree with that, that is to say, if no document which could possibly be described as particulars was delivered. But if a document was delivered about which the argument would be "Is it illusory?" then I think it might be the subject of a further application. In my opinion this appeal should be dismissed.

Jenkins L.J. I agree.

Morris L.J. I agree.

Appeal dismissed.

Solicitors: *J. de Meza & Co.; Mendes da Costa, Greenwood & Co.*

A. W. G.

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[2] [1893] 1 Q.B. 185, 186.

HITCHCOCK *v.* W. B. AND F. E. B. AND OTHERS.

1952
May 27.

Lord Goddard C.J., Hilbery and Devlin JJ.

Adoption—Consent of parents of child—Unreasonable withholding of consent—Benefit of child—Distinction between order for custody and adoption—Circumstances constituting unreasonable refusal to consent—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 3 (1) (*c*).

Where an order for the custody of a child has been made by justices in favour of one of the child's parents and such order has been affirmed on appeal by a judge of the High Court, the fact of the existence of the order does not, of itself, make the refusal of the other parent to consent to the making of an adoption order in relation to the child "unreasonable" within the meaning of section 3 (1) (*c*) of the Adoption Act, 1950.

In the case of an application for the custody or guardianship of a child, the overriding consideration is the interest of the child, but in that of an order for adoption which has the effect of extinguishing, once and for all and entirely, the parents' relationship, except that of blood, with the child, other matters must be taken into consideration and if, *e.g.*, it is established that a father has an honest desire to remain the parent of his child, that he is working satisfactorily so that he has means to contribute to the maintenance of the child, whether in some institution or elsewhere, there is no ground for saying that he is acting unreasonably, if he is not prepared to agree to the making of an order by which the child will be entirely removed from his life.

CASE STATED by justices of the county borough of Newport.

On November 16, 1951, an application was made to a court of summary jurisdiction sitting at Newport, Mon., by W. B. and F. E. B., the first respondents (hereinafter called the adopter respondents), under the Adoption Act, 1950, for (a) an adoption order in respect of Raymond Gordon Hitchcock, the infant child of the appellant Robert Hitchcock and his wife Isabella Hitchcock, the second respondent, and (b) that the justices, acting under section 3 (1) (*c*) of the Act,[1] should dispense with the consent of the appellant to the adoption order on the ground that such consent had been unreasonably withheld. In addition to those mentioned above, the Western Adoption Society and the Newport County Borough Council were also respondents to the present appeal.

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[1] Adoption Act, 1950, s. 2 (4): "Subject to the provisions of section "three of this Act, an adoption order "shall not be made—(*a*) in any "case, except with the consent of "every person or body who is a "parent or guardian of the infant or "who is liable by virtue of any order "or agreement to contribute to the "maintenance of the infant."

S. 3 (1): "The court may dispense "with any consent required by para-"graph (*a*) of subsection (4) of sec-"tion two of this Act if it is satisfied "—(*c*) . . . that his consent is un-"reasonably withheld."

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AND
F. E. B.

The following facts were proved or admitted before the justices: The appellant and the mother respondent were married on June 4, 1949, and the infant was born on February 12, 1950. Before being married to the appellant his present wife had had an illegitimate child which had been adopted. Before his marriage the appellant had a criminal record. A few days after the marriage he was arrested for larceny of money which he had stolen for the expenses of the marriage, and was placed on probation. In May, 1950, he was sentenced to four months' imprisonment for a breach of his probation, and in April, 1951, he was found guilty of having stolen a registered letter in September, 1950, and was put on probation for three years.

The appellant's wife left him six weeks after the marriage and had since lived separate and apart from him and had refused to disclose to him where the infant was or to forward to the infant a cot and other articles which the appellant had bought for him. She had always wanted, spitefully, to prevent the appellant from getting the infant.

On May 25, 1950, the custody of the infant was given to the mother by a court of summary jurisdiction and the appellant was ordered to pay one shilling weekly for the maintenance of the infant. One month after the child's birth he was placed with foster parents by his mother. Since December 6, 1950, the appellant had been employed as a ward orderly at a hospital and was a good worker and had proved himself very satisfactory. He had always wanted the infant to remain his child and wished to carry out his parental duties to him.

On April 17, 1951, the appellant made application to the justices to revoke the order giving the mother the custody of the child, and on that application being dismissed he appealed to the Chancery Division. In dismissing that appeal, Romer J. said that the appellant seemed to want to have the child but that it was quite impossible to hand him over. It might be in the best interest of the child that he should be adopted into a good home, but that, if he were not adopted, nothing in the proceedings before him (Romer J.) would prejudice any further application by the appellant to have the child. It was further proved before the justices that the appellant had not a home where the child could be received immediately and that, if the adoption order were not made, it was his intention to put the child in a nursery home where he could contribute to its maintenance until such time as he could have the child with him. The adopter parents were fit and proper persons to adopt the child.

The ground on which it was alleged in the statement supplied to the justices in conformity with the Adoption of Children (Summary Jurisdiction) Rules, 1949, r. 1, that the appellant's consent was unreasonably withheld was the fact that an order for the custody of the child had been made in favour of the mother by a court of summary jurisdiction; that an application to revoke that order had been dismissed by justices and that an appeal to the Chancery Division against such decision had been dismissed by Romer J.

The justices held that the appellant's consent to the adoption order was unreasonably withheld and they accordingly dispensed with his consent and made the order.

Maude Q.C. and *W. L. Huntley* for the appellant. The justices were wrong in holding that the appellant's consent to the adoption order was unreasonably withheld within the meaning of section 3 (1) (*c*) of the Adoption Act, 1950. That Act provided for the continued operation of the Summary Jurisdiction (Adoption) Rules, 1949, made under the Adoption Act, 1926, and in Form 1, set out in Sch. I to those rules, which has to be filled in by the proposed adopters if they desire the court to dispense with any consent which is required by section 2 (3) of the Act of 1950, they must set out the grounds on which they rely as proving that the refusal was unreasonable. The only ground set out in the present case was the fact that an order for the custody of the infant had been made in favour of the mother; that an application by the father to the justices to revoke that order had been dismissed and that a judge of the High Court had dismissed an appeal from the justices. The grounds set out in the form are binding on the applicants for the adoption order and it is submitted that the only ground relied on was not one which would justify the justices in holding that the appellant's consent was unreasonably withheld. There was no evidence before the justices on which it would be competent for them to hold that the applicant was unreasonable in wishing to have the care and custody of his child, and in giving their decision they did not give any reasons for saying why, in their view, his consent was unreasonably withheld. They appear to have acted on the basis that the overriding consideration was the benefit of the child. Although that may be so in the case of an order for custody, it is submitted that it is not the paramount consideration in that of an adoption order, and that before considering the question of the child's benefit the justices must first decide whether the parent's consent was unreasonably withheld. In the present instance, although the appellant had previously had a criminal record, he was now, as found by the justices, working satisfactorily, and was in a position to contribute to the support of the child, and that being so it is submitted that, merely because he objected to the making of an adoption order which would permanently deprive him of all rights in the child, it cannot be said that he was acting unreasonably.

L. Herrick Collins for the respondents. The question here is whether there was material before the justices which enabled them to come to the conclusion that the father's refusal to consent to the adoption order was unreasonable. It is submitted that there was evidence before them which enabled them to do so. Although the justices found that the appellant wanted to have his child, it was clear from the facts before them that he had no chance of carrying out his parental responsibilities. If a father has no expectation of being able to provide a home for his child, and has no relatives who are willing to take charge of it, it is his duty, if he wishes to do the best for his child, to agree for an order for its adoption.

[LORD GODDARD C.J. Do you say that the paramount consideration is the benefit of the child?]

No, but when it is found, as here, that the father cannot provide a home; that the mother cannot do so either because she wishes to go out to work; that there is no hope of a reconciliation between the parents; and that the time has arrived when the child should have a home, it is submitted that the whole matter is at large, and that the justices were entitled to consider whether the father's refusal was reasonable or not and, on the evidence before them, to find as they did.

LORD GODDARD C.J. This is a case stated by justices of the county borough of Newport, to whom an application was made under the Adoption Act, 1950, for their consent to the adoption by the first two respondents of an infant child, aged about two, the issue of the marriage of Robert Hitchcock, the appellant, and Isabella Hitchcock, the mother, who is one of the respondents. The case raises points of very considerable importance.

The father and mother of the child were married in June, 1949. There is no doubt that at that time the father was a man who had been committing crime. Among other things, he was apparently wanted for stealing money to buy an outfit for his wife on her marriage, and for that he was put on probation. In July, 1949, the wife left him. It is quite impossible for this court to inquire, and I do not suppose that the justices went into the question, who was mainly responsible for the break-up of the marriage. It may be that the woman had a great shock on finding that her husband had committed the offence and had been put on probation, but it does not speak particularly well for her that she only gave her marriage a month's trial. At the time of her marriage she was pregnant, and one cannot say that it indicates a lack of parental responsibility that this young man had married a girl in order to give a name to the child who would be born in some future month. His wife left him and gave him no chance of seeing the child or having anything to do with him or of reforming himself, and one knows from experience that marriage does sometimes do a good deal to reform a man. However, the child was born in February, 1950. The wife meanwhile was still living away from her husband and no doubt she had to support herself. She never asked her husband to support her and she did not take proceedings against him. If she had done so, I think she would not have been able to get a maintenance order because she had left him. She put the child out to nurse with foster parents in March, 1950. Unfortunately, in May the applicant committed a further offence and received a sentence of four months' imprisonment.

On May 25, 1950, about the time when he received that sentence, the wife obtained an order for the custody of the child, which I have no doubt was a very proper order to make, since the husband had gone to prison and it was a very young infant. The only order made on the husband was that he was to pay 1s. a week for the child. That was admittedly a token payment which was not intended to be enforced, and the husband was never asked to pay anything either for the upkeep of the wife or the upkeep of the child.

In September, 1950, the father stole a registered letter and was put on probation for that offence. On December 6 he obtained work at a hospital, and it is to his credit that after three convictions and his wife never having returned to him he has apparently turned over a new leaf, because the justices found that: "Since "December 6, 1950, the appellant has been employed as a ward "orderly at the Sambourne Hospital, Warminster, in the county "of Wilts, and is a good worker and has proved himself very "satisfactory."

On April 17, 1951, he tried to get an order for the custody of the child and the justices refused his application. I am far from saying that they were wrong not to give him the custody of the child at that time, in fact I think that they were right, but the applicant appealed to the High Court. The matter was heard by Romer J., who said that "the appellant seemed to want to have "the child, but it was quite impossible to hand it over to him, "and that it might be in the best interest of the infant that he "should be adopted into a good home, but that, if the infant "was not adopted, nothing in the proceedings before him would "prejudice any future application by the appellant to have the "child." Obviously the judge took the view that here was a man living alone and it was impossible to hand the child over to him. The mother was not wanting the child; she had put it out to nurse and showed that she did not want to have any more to do with it. I am not blaming her; she had to keep herself somehow and I daresay she could not keep the child. But it is observable that the justices found that since she left the appellant after only six weeks of marriage she "has at all times refused "to disclose to the appellant the place where the infant was, or "to forward to the infant a cot and other articles which the "appellant had purchased for the infant." That did not look as if this man wanted to have nothing to do with the child and was unmindful of his parental responsibilities.

Moreover, the justices found that the mother had always wanted spitefully to prevent the appellant getting the infant. So there again, it was hardly fair to say that the father was not indicating a sense of parental responsibility towards the child or that he was being given any fair chance to act as a father should. No doubt when Romer J. had to consider the point he could not well say that this child was to be given over there and then to the father, because the father had not a home of his own and apparently had not a relative who was able to take the child in and look after it. No doubt the judge expressed the opinion, which I think anybody might hold, that so far as the interests of the child were concerned it would be a very good thing if the child were adopted; but he added that if the child was not adopted, nothing that had happened before him was to prejudice a future application by the appellant to have the child. Romer J. obviously did not consider that this man had shown himself unfit to be a father or unfit to have the child in the future. This was not a case in which, as sometimes happens, the court said that in no circumstances shall one parent or the other have the child because the mode of life of the applicant or other reasons had shown that he or she is unfit to have the child. Judges of the Chancery Division, in making children wards of court, had sometimes to take that line, but it is clear that the judge in this case did not take that view, though, as I have said, he did not alter the order that gave the custody to the mother.

The next thing that happened was that the child was placed, I suppose by the foster parents—and I will assume with the consent of the mother—with the applicants for adoption, with whom, under the Act, the child must have lived for three months before they could make the application to be allowed to adopt him. Evidently they were fond of the child and wanted to do so, and they then applied to the justices. It is necessary now to see what are the provisions of the Act and of the statutory rules with regard to the proceedings which must be taken before an adoption order can be made. The parents have both to give consent if they are alive—that is the first thing—and, if they do not, by section 3 (1) of the Act: "The court may dispense with any "consent required by paragraph (*a*) of subsection (4) of section "two of this Act if it is satisfied—(*a*) in the case of a parent or "guardian of the infant, that he has abandoned, neglected or "persistently ill-treated the infant; (*b*) in the case of a person "liable by virtue of an order or agreement to contribute to the "maintenance of the infant, that he has persistently neglected "or refused so to contribute; (*c*) in any case, that the person "whose consent is required cannot be found or is incapable of "giving his consent or that his consent is unreasonably withheld."

Then, under the Adoption of Children (Summary Jurisdiction) Rules, 1949 (S.I. 1949, No. 2397), a form has to be filled in and lodged with the court by the proposed adopters; and among other things for which they can ask is to request the court to dispense with the consent of anybody who has to give consent "on the "following grounds," and then they have to set out the grounds. That form is not served on the respondents or any of them or on any of the persons who have to give consent. The form which has to be served on them is Form No. 3, which does not give the person on whom it is served any information except that the application will be heard on such-and-such a day and asks that person whether he consents or does not consent, and to return the form saying whether he consents to the making of the order or not, because if the spouse returns it saying that he does consent the justices can proceed; if he says he does not consent they have to consider the matter.

Mr. Maude, in opening this case, suggested that the justices could not consider any ground for dispensing with the consent except the ground set out in this form. We certainly cannot take that view, because we do not find anything in the Act or rules which prescribes that the person must set out, so to speak at his or her peril, the whole of the grounds on which they wish to ask for the consent to be dispensed with. It is a matter for the court to decide, and other persons can be heard, including the local authority or guardian ad litem appointed by the local authority, or the adoption society. We, therefore, do not think that there is anything in that point. But I call attention to the fact, because I do not think that it is altogether without significance, that the only ground which was put forward by the adopters—and I should think it is highly likely that the adoption society assist in these matters—for asking that the consent might be dispensed with was " the fact that the legal custody of the infant was given to " Isabella Hitchcock, the mother of the infant, on May 25, 1950, " by an order made by the justices of the petty sessional division " of Trowbridge, in the county of Wilts, against which said order " the appellant laid a complaint before the said magistrates on " April 17, 1951, who dismissed the said complaint," and that their decision was affirmed by Romer J. in the High Court.

Therefore, the only ground on which the justices were asked to dispense with the consent was that the custody was in the mother, and the father had been refused custody both by the justices and by the judge. If that ground weighed with the justices in making the adoption order, I can only say that in my opinion it should have had the very lightest weight possible, and I do not think that it is really a matter to be taken into account at all. In all these cases of broken homes, when there are children, one parent or the other must have the custody to start with. Custody may be given by the justices, by the Divorce Court, by this court if there is a habeas corpus proceeding with regard to the infant, and it may also be given by the Chancery Division. Somebody has to have custody of the child, but because one parent may be given the custody it by no means follows that the other parent is never, for the rest of the child's life, to have any rights, natural or otherwise, in the child.

An adoption order is an order of the most serious description. It removes the child once and for all from his natural parents and gives him to the adopted parents as though they were, and always had been, his natural parents. I am not going into certain questions about property rights and titles, intestacy, and matters of that sort; they do not matter for this purpose. It is the fact that by an adoption order a child is removed once and for all and entirely from the parent. That is an extremely serious matter, but a parent, a father, for instance, who may have met with misfortune—whether by his own fault or otherwise—may still be by no means a bad father. He may be a man who is devoted to his children. If he is neglectful of his children there are plenty of proceedings now by which he may be made to perform his parental duties or his children may be placed in the care and protection of the local authority. Even then the father has some rights as a father. In the case of adoption, once the adoption order is made, the father or the mother can never see their child again unless by permission of the adopting parents. Under the Act the parents who adopt the child are solely and absolutely in charge of it and can prevent the natural parents seeing the child at all.

Let us see what the justices found in this case and what evidence there was on which they could say that the applicant had unreasonably withheld his consent. I am far from criticizing the justices, though I may not agree with them—which is a very different thing—but they are, of course, very much accustomed to applications being made before them for custody of children; and in such cases the overriding consideration is the welfare of the child. That overrides all other considerations. When the question is one of custody or guardianship, the test which any court, whether the High Court or a court of summary jurisdiction, has to apply is that of the benefit of the child. That is where I think perhaps the justices went wrong in this case. I think that their minds have been so filled—and I can well understand it—with considering what is for the benefit of the child in cases of applications for custody, that they have overlooked the fact that they are here making an adoption order, the effect of which is to extinguish wholly once and for all the parents' relationship to the child, except that of blood relationship.

The case states that various contentions were put forward before the justices. One of them, which was, I suppose, taken from the address of the advocate who appeared for the adopters below, was that the appellant had a grudge against society and should not have the infant as the appellant was not a fit and proper person to care for the infant; that the appellant's opposition was in order to assert his own position and not because of paternal instinct. That may have been the contention, but the justices tell us what they found, and their finding seems to me to negative the above contention wholly and absolutely. They might have found that the mother only regarded the child as a pawn in the dispute between herself and her husband. As I have said, they did find that she refused to give her husband any information about the child and always wanted spitefully to prevent him from getting the child. What the justices found, after having said that he was a good worker and very satisfactory in his work, was that the appellant had always wanted the infant to remain his child and that he wished to carry out his parental duties to the infant. That is their finding of fact.

Then we come to another finding, that the appellant had not available a home where the child could be received immediately and that if an adoption order were not made it was his intention to put the child in a nursery home where he could contribute to its maintenance until such time as he could have the child with him. If the question was one of guardianship or custody, the fact that one parent or the other has not at the time a home into which to put the child is a most material factor. The mother in this case wants to get rid of the child; the father does not. The father has not a home to which he can at once send the child, but someone must have the guardianship of it. Why, then, is it to be said that the only way of giving the child the necessary care and protection or custody or guardianship, or whatever it may be called, is to make an adoption order by which the father, who wants to have his child, and whom the justices have found to be honest in that desire, is to be shut out from having any parental rights in that child at all? I confess that I cannot see here that there is any evidence that the father is acting unreasonably. He is in no worse or different position from that of many men whose wives may have left them by death or desertion and who may find themselves perhaps with two or three young children, and who may be in serious difficulty, especially if they are men whose wages are not very high, in finding accommodation for the children or in finding someone who will look after them. I have never heard that state of affairs put forward as a reason why the children should be taken away from the father and made someone else's children, for that is what happens under an adoption order.

In my opinion the first thing to be established before an adoption order is made is that both parents consent to their children being taken from them permanently and given to others. If they do not consent, the order may be made, notwithstanding their refusal for the reasons which are given in paragraphs (*a*) and (*b*) of section 3 (1) of the Act; and under paragraph (*c*), if it can be found that for some reason the husband or the wife is unreasonably withholding his or her consent. But the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld. I am not going to attempt, because it would be a most dangerous thing to do, to lay down in general terms what would amount to the unreasonable withholding of consent, for circumstances in this life are so various, but with regard to the present case, I do say that when once the justices find that a man has an honest desire to remain the parent of his child, and that he is working properly and satisfactorily so that he has money which he can contribute to the upkeep of the child, although he may have to put the child into some form of institution, if all these circumstances exist I can see no reason why a father can be said to be acting unreasonably if he says, "Good as it might be for my "child to be adopted and looked after by somebody else, I am not "prepared that my child should be removed entirely out of my "life and no longer be a member of my family and that I should "be as if I had never had the child at all."

For these reasons, in my opinion, we ought to reverse the decision of the justices in this case.

HILBERY J. This is an important matter, but I do not think I can usefully add anything to my Lord's judgment. I agree.

DEVLIN J. I agree. On the construction of the Act and of the meaning of the words that consent has been unreasonably withheld, I think that it is significant that the provision in the Act of 1950 is to be contrasted with that which was contained in the earlier Act of 1926, where the legislature provided that consent could in effect be dispensed with if in the opinion of the court and in all the circumstances of the case it ought to be dispensed with. That gives an absolute discretion and, in exercising their powers under a section so worded, the justices would no doubt be right in regarding as the matter of paramount importance the welfare of the child. But here the section is worded differently. It is unnecessary to speculate on the reasons

Parliament had for making a change. It may have considered that, while the welfare of the child is of paramount importance, in the long run it would be better to allow the child to remain with its natural parents if one of them wanted it, than to look at the long term advantages. However that may be, it is plain that the test is no longer the welfare of the child.

My Lord has drawn attention to the nature of section 3 and to the fact that the circumstances in which consent may be dispensed with are circumstances of parental misbehaviour or cases in which the husband or the wife has, by absenting himself or herself or something of that kind, put it out of his or her power to give or withhold consent. In short, they are cases in which the parent has by his or her own act disqualified himself or herself from having his or her refusal of consent attended to. It is in that light that one has to construe the section and to decide whether the consent is unreasonably withheld.

In my judgment the test is this: Is the attitude of a father, as a father, in refusing consent, unreasonable? If it is possible to say that a father could reasonably come to the conclusion that his child ought not to be adopted it seems to me impossible to hold that his consent is unreasonably withheld. No doubt the welfare of the child is of importance because a father who had no regard for the welfare of his child in reaching such a decision is not reasonable, but it is no longer the test. The test which has to be directly applied is an inquiry into the attitude of the father, and that, I think, was not really disputed by Mr. Collins. That being so, there are two questions which fall to be asked. The first and obvious one is: Is consent being refused whimsically or arbitrarily or not in good faith ? because if so, a fortiori it would be unreasonable. On that the finding of the justices is conclusive to the contrary, because they find that the appellant has always wanted the infant to remain his child and wishes to carry out his parental duties to the infant. Of course, it does not follow, as Mr. Maude said, that a father's desire to keep his child is necessarily conclusive that his decision to do so is reasonable; he may be a dipsomaniac or otherwise quite unfitted to have the child, however much he may want to do so. But once it is established that he wants his child, that he is fit to be a father, and that he can support his child, it seems to me prima facie that it is impossible to say that a decision not to have his child adopted is unreasonable. The test is exactly the same as one would apply to the actions of a father in any other circumstances, not necessarily in relation to adoption. If, for example, a father whose home had been broken up, chooses to send his children to school instead of boarding them with relatives, the question one would ask would be: Is a father in those circumstances acting unreasonably? Prima facie, as I say, it seems to me that if he can say that he wants the child, and he is fit to be a father and can support him, that is sufficient.

The argument of Mr. Collins that he must go on and satisfy the justices that he can provide a home for him, either now or in the immediate definite and foreseeable future, is adding something which is not applying the test at all. There may be all sorts of reasons why a father cannot provide a home for his child, either immediately or in the forseeable future. The provision of a home might be an overriding consideration if the test were the welfare of the child, but if the test is the reasonableness of the father, it is not enough that he is not in a position to say immediately and definitely that he can provide a home or disclose his plans for providing a home. The prima facie conclusion can, of course, be displaced, but the burden of so displacing it lies on those who assert that the refusal is unreasonable. If they can bring evidence before the court which shows that his prospects of providing a home are quite illusory and that there is no real chance of it, that would be a matter to be taken into consideration. Again the test is the same: a father might say, "I want "my child and I think that I can find a home for it," but if an answer, a satisfactory answer to the minds of the justices is, "You want your child but, having regard to the difficulties with "which you are faced and having regard to your own past record "and your own situation you will never be able to provide a "home for him or bring him up as you ought and, you should "realize, as a reasonable man, that it is in his best interests that "you should part with him altogether," then the presumption of reasonableness is displaced.

I bear in mind constantly that what we are considering in this case is not whether we agree or disagree with the justices, but whether there is any evidence on which they could reach the conclusion at which they have arrived. They have not stated their reasons; they have simply expressed their opinion that the appellant's consent is unreasonably withheld and that they would dispense with it. But when one looks at the case it seems to me that they have set out facts which necessarily lead to the conclusion that the father did want his child, was fit to be a father and could support it. They have set out no facts which rebut the prima facie inference or show that his decision to keep the child was an unreasonable one. Therefore this is a case in which it can properly be said that the findings of the justices are not supported by the evidence they have set out.

I wish to emphasize that this is a very exceptional case, for the reason that it is one in which the justices construing a new Act have not applied the right test. That, I think, is the conclusion which must inevitably be drawn when one looks at the case as a whole. They have applied the broader test of the welfare of the child, as my Lord has said, and when one examines the evidence in the light of that, their conclusion appears to be a reasonable one. If one examines it in the light of the test which this court is adopting, I think it falls to the ground as not being supported by any evidence. As a general rule, once I am satisfied that the justices have applied the right test I should be most reluctant, in a case of this type, to go through the evidence as it is set out in the case, to find that the justices' decision was unjustified. One has to bear in mind, in a matter of this kind, that it is almost impossible to set down in black and white on paper all the evidence or the considerations which might influence the justices. Fragments of evidence may only tell half the story; the other half is told by the demeanour of the people in the box and the impression gained from their bearing. It is the universal rule of these courts, and it is to be applied in this case just as much as in others, that an appellate court does not interfere with the findings and conclusions of fact of the justices or judges below who have seen and heard the witnesses. That is particularly so in a case of this kind, but for the reasons which I have given, and satisfied as I am that the justices have not applied the right test according to the true construction of the Act, I think that their decision in this case cannot be upheld.

Appeal allowed.

Solicitors: *Woodcock, Ryland & Co., for Vicary & Knight, Warminster, Wilts.; David Morris, Newport, Mon.; Withy, King & Lee, Bath; Sylvester & Mackett, Trowbridge.*

P. B. D.

STAPLEY *v.* GYPSUM MINES LD.

SAME *v.* SAME.

[1950 S. 5126.]

C. A.

1952
Mar. 14, 17,
18, 19;
Apr. 7.

Singleton, Birkett and Morris L.JJ.

Negligence—Breach of statutory duty—Contributory negligence—Metalliferous mine—Order by foreman to two miners to fetch down a "drummy" (insecure) roof in mine—Failure by miners to obey order—No report by miners to foreman—One miner resumes normal work under "drummy" roof—Killed by fall of roof—Employers sued by widow—Metalliferous Mines General Regulations, 1938 *(S. R. & O.* 1938, *No.* 630, *as amended by S. R. & O.* 1945, *No.* 1351), *regs.* 7 (3), 14 (1) *and* (7), *and* 15 (1) (2) (3) *and* (10).

S. and D. were miners, a breaker and a borer respectively, of equal status, working in the defendants' gypsum mine and employed by them: neither was in charge of the other. Having passed along the twitten to the stope where they were to work, they tapped the roof and found that it was "drummy," an indication that it was dangerous and that there might be a fall. They spoke to their foreman about the roof and he gave them the order:—"Fetch it "down," which was understood as including the corollary not to do ordinary work under the roof, until it had been made safe. The foreman then left them and continued on his routine duties.

For about half-an-hour S. and D. endeavoured to get the roof down by using a pick. They then, by a joint decision, abandoned their effort to bring down the roof and proceeded upon their normal work. D. went into the twitten to bore some holes. After half an hour D. returned to the stope and found S., whose work was to break up the gypsum in small pieces, lying dead in the stope under a fall of the roof which had killed him; by his side was a pitcher or short drill.

In an action brought by the widow of S. against his employers claiming damages for the death of her husband under the Fatal Accidents Acts for negligence at common law and breach of statutory duty, under the Metalliferous Mines General Regulations, 1938, as amended, the trial judge found that the actions of D. and of S. himself were causes of the death of S., through failing to do that which the foreman had told them to do and in failing to report that fact to the foreman and in deciding together to continue their work with the roof in the state in which they knew it to be; that the foreman was justified in leaving D. and S. to carry out the order he had given them, for which they were competent and that there was no lack of proper supervision. Accordingly, he gave judgment for the plaintiff against the defendants (*semble,* as the employers of D) for one half of the amount which he would have awarded, if S. had not been also responsible for his own death. On appeal:—

Held, that the defendants themselves were in breach of statutory duty, which was absolute, that the roof of the mine should be made

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secure (see regs. 7 (3) and 14 (1); but that the death of S. could not be said to have been caused by that breach. Had S. only suffered personal injury, he could not have asserted as against the defendants that they were in breach of statutory duty, if the reason for the assertion was that S. and D. (whose responsibility was no greater than that of S.) had neglected to do what they had been ordered to do. S. having died, his widow, the plaintiff could not so assert under the Fatal Accidents Acts.

Further, on the contention that the defendants' liability was vicarious through D., S. if only injured could not have successfully sued D., since he could not point to any negligence or breach of statutory duty on D.'s part which was not fully and wholly his own. Nor, when S. died, could his widow. Accordingly, the plaintiff could not assert that D. had caused her husband's injuries.

If, contrary to the view of the court, the defendants had been vicariously liable through the conduct of D. then the responsibility of S. for his own death was such that under section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, responsibility of the defendants could have been merely nominal.

Per Birkett L.J. The appeal of the defendants might be allowed on another ground, namely, that the sole cause of S.'s death was his own breach of duty in resuming his normal work in a place under the "drummy" roof.

Decision of Sellers J. reversed.

APPEAL from Sellers J.

John Stapley and John Dale were miners who worked together for the defendant company in their gypsum mine. The former was a breaker, and the latter a borer, and they were of equal rank and status. Stapley had the longer experience; he was a good workman, though slow. The place at which they were to work on August 21, 1950, was No. 9 stope; the way to the stope is along what was known as the twitten. In accordance with their practice they tapped the roof as they approached the stope (where there was a fault) and they found that the roof was "drummy," which was an indication that it was dangerous, and that there might be a fall. This is often found after there has been shot-firing. They drew the attention of the foreman, Church, to this, and he gave them the order "Fetch it down," which was understood as meaning "Do not work under it until "you have got it down." For half an hour or so Stapley and Dale tried to get it down by using a pick, but they did not succeed, and they decided to get on with their normal work. Dale went into the twitten to bore some holes. If the order had not been given by the foreman, in other words, apart from the danger arising from the roof, Stapley's work would have been to break up the gypsum into small pieces. After half an hour

Dale returned to the stope, and as he did not see any light he looked for Stapley, and found him dead in the stope under a fall of roof; by him there was a pitcher or short drill.

The widow of Stapley, the plaintiff, brought an action claiming damages on behalf of herself and her children against the defendants, her husband's employers, which was heard by Sellers J. at Lewes assizes. The plaintiff alleged negligence and breach of statutory duty, under certain of the Metalliferous Mines General Regulations, 1938, as amended [1] (made under the Metalliferous Mines Regulation Acts, 1872 and 1875), hereinafter called the regulations. At the end of the evidence his Lordship allowed an amendment of the particulars pleaded by an addition (No. 10) which was: "The said Dale, their" (the defendants') "servant, failed to bring down the said roof by firing or boring "holes for firing and/or failed to report to the said Church" (the foreman) "his inability to bring down the said roof."

The judge found that Stapley and Dale were working there as men of equal status as regards this obligation; one was not in charge of the other. They were working together, and it seemed to him that they were both responsible for the events which happened, and in those circumstances one could only say that the man Stapley, unfortunately by his own act, brought about the loss which his widow and children had suffered, but equally so did the act of Dale; either of them could have avoided this accident if they had done that which it was proper for them both to do. He accepted the evidence of Dale that they had abandoned any attempt to bring down the roof and had agreed together to carry on with their work. He thought all the facts pointed to the definite view that at the time of the accident Stapley was carrying on with his ordinary work as if the roof under which he was working had been made secure, and was secure. Further, Sellers J. was satisfied that both men understood the order given to them by the foreman and that it was their task to take out as much as was necessary to make the roof safe. There were three ways in which that could have been done, and they were all known to the two men, and the processes were quite familiar to them. His Lordship continued: "Apparently the customary preparation was in any event to use "a pick and see if one could get the point of the pick underneath "the offending piece of roof to loosen it and bring it down. If "the roof is more stubborn a pinch-bar may be used to bring "it down; that is the second method. The third one is to bore "holes and to get a shot-firer, who is of a still higher grade and "works in conjunction with these two men, to put his shot in "and blast it down, just as the gypsum itself is blasted down. "All those three ways were known. It was suggested in the "course of this case on behalf of the plaintiff, mainly by the "evidence of a witness called Field, that there ought to have "been someone there, that Mr. Church ought to have remained "there, because of the particular circumstances that prevailed, "and superintended the task which he had imposed upon these "two men Stapley and Dale. I did not find Mr. Field a very "satisfactory witness; I thought he was too much of the advocate "rather than the witness who was speaking as to matters of fact "and experience with which he was familiar. I am not of the "view that it was in the circumstances necessary for Mr. "Church, who had other routine duties to do, to remain there "and see this work done. The plea that has been made, that "there was a lack of supervision, is rejected by me on the "evidence which has been given here."

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[1] By the Metalliferous Mines General Regulations, 1938, as amended by reg. 7 (3): "The roof "and sides of every travelling road, "outlet and working place shall be "made secure, and no person, unless "engaged in repairing or in investigating the safety of the workings, "shall travel on or work in any "travelling road or working place "which is not so made secure."

By reg. 14 (1): "The owner or "agent shall carry out the provisions "of the Acts, the Regulations, and "the special rules, and to the best "of his power enforce the observance "thereof, and he shall give such "directions as may be necessary to "ensure compliance with those provisions and to secure the safety of "the mine, and the safety, health "and proper discipline of the persons "employed."

By reg. 14 (7): "If any danger is "revealed by the examination or "inspection, steps shall be taken at "once to remove it and except for "that purpose any person exposed to "the danger shall be withdrawn."

By reg. 15 (1): "Every person "employed at the mine shall comply "with the provisions of the Acts, the "Regulations and the special rules "and any regulations made by the "owner or agent in pursuance "thereof, and with such directions "concerning safety and discipline as "may be given by those in authority "over him."

By reg. 15 (2): "Every workman "employed in the mine shall, before "commencing work, and during the "course of it, especially after blasting, make a careful examination of "his working place, and so far as "practicable remove any or secure "any loose rock, stones or ground "which might be dangerous."

By reg. 15 (3). "Every person "employed at the mine who notices "anything that appears unsafe, or "likely to cause danger, shall remedy "the matter if it is within the scope "of his duty, and if not shall withdraw forthwith from the place of "danger and report the matter to the "owner, agent, or other responsible "official."

By reg. 15 (10): "No person shall "negligently or wilfully do anything "likely to endanger life or limb in "the mine, or negligently or wilfully "omit to do anything necessary for "the safety of the mine or of the "persons employed therein."

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Sellers J. held that the accident was due to the conduct of both Stapley and Dale in failing to do that which the foreman had told them to do, and in failing to report to the foreman and in deciding together to continue their work with the roof in the state in which they knew it to be. Accordingly, he gave judgment against the defendants, as the employers of Dale (see particular No. 10, supra) for £1,512 10s. 0d., being one-half of the amount which he would have awarded if Stapley had not been partly responsible.

The defendants appealed and the plaintiff cross-appealed.

Percy Lamb Q.C. and *Friend.* The defendants are not liable. Even if their servant Dale, who worked with Stapley, was negligent and his negligence was a causa sine qua non, the primary cause of the accident was the plaintiff's own act in working under the " drummy " roof in contravention of the duties imposed by the Metalliferous Mines General Regulations, and of the instructions given to him and to Dale by the foreman pursuant to his duties under these regulations.

It was not the failure of Dale to bring the roof down, or to report his inability to do so to the foreman, that caused the accident, and neither of these omissions, however reprehensible, was a " fault " within the meaning of that word in section 1 (4) of the Law Reform (Contributory Negligence) Act, 1945, as something giving rise to a right of action in tort and making it necessary for the court to apportion the blame for the accident between the defendants and the plaintiff.

If a miner is instructed not to work under a " drummy " roof because it is unsafe and he chooses to disobey that instruction and for that reason is killed, the failure of another person to make the roof safe is not the proximate cause of the accident to the disobedient miner. It is only necessary here to discover what was the effective cause of the accident, and that was Stapley's own act in disregarding his statutory duties and the express instructions given to him by the foreman. No damage flowed directly from Dale's disregard of instructions and it did not, therefore, give rise to a cause of action and is irrelevant. In *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*[2] Lawrence J. held that an accident was caused by the workman's disobedience to orders. There should also have been a fence on the machinery, but the absence of the fence was not the proximate cause of the accident.

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[2] [1934] 2 K.B. 132.

That case was cited with approval in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[3] It was not necessary to decide in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*[4] what was the proximate cause of the accident, and the approval of that case only went to the statement as to what constitutes contributory negligence. It does not help in deciding what was the proximate cause of the accident.

The two workmen were of equal status in this case. Dale was not in authority over the deceased. They had equal knowledge of the state of the roof and both were told to bring it down. Dale, therefore, cannot be responsible for Stapley's failure to obey those instructions. It has been said that the two workmen made an agreement to disregard their instructions, but that was not pleaded and, in any case, the making of an illegal agreement would have been outside the scope of their authority and the defendants could not be responsible for any damage flowing from it. The negligence of the one party to the illegal agreement could not be pleaded by the other.

As in *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation Co.*,[5] the deceased was in a position to see that safety operations were not being carried out and that if he did not take care an accident might occur. He failed negligently to avoid that accident. His action in going to work under the roof was subsequent to the illegal agreement (if any) and was an act of negligence separate and severable from that agreement. The fact that the workmen had decided not to bring down the dangerous roof would not have endangered Stapley if he had not subsequently decided to work under it. The fact that the two men may have discussed it together is irrelevant. The direct cause of the injury was Stapley's working under the " drummy " roof when he knew that it was insecure, and to work there was contrary to his orders.

It has been said that the defendants were under an absolute duty imposed by regulations 7 (3) and 14 (1) of the Metalliferous Mines General Regulations, 1938, as amended, not to allow anyone to work underneath a dangerous roof, but the owner or agent is only required to enforce observance by the workmen " to the " best of his power ": see regulation 14 (1). The foreman had given explicit orders to the workmen and, on behalf of the owners, had done all that he could reasonably be expected to do.

In *Davies* v. *Swan Motor Co. (Swansea) Ld.*[6] there was contributory negligence, and the damages were apportioned. Here the judge held that both men were equally responsible and divided the damages. I submit that contributory negligence does not enter into this at all and that the wrong principle was applied, but, if that is decided against me, then I submit that the employers should in any case only be responsible for a nominal amount of damages.

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[3] [1940] A.C. 152, 174.

[4] [1934] 2 K.B. 132.

[5] [1924] A.C. 406, 420–1.

[6] [1949] 2 K.B. 291.

If the defendants were in breach of their statutory duty under regulations 7 (3) and 14 (1) that breach here was not the cause of the injury to Stapley. That cause was the deliberate disobedience of Stapley in working under the insecure roof contrary to the order of his foreman. He deliberately encountered a danger of which he was well aware. If the order of Church had not been given to Dale as well, then the defendants might be liable to some degree; but the order was given to both men, and if Stapley had merely been injured and had not died he would have had no action against Dale and so no action could lie against the defendants on the ground of any vicarious liability. No doubt Dale was in breach of the regulations (see regulation 15 (1)), but that was with the concurrence and assent of Stapley.

Smith v. *A. Baveystock & Co. Ld.*[7] concludes the case. The adjustment of the guard of the circular saw was left to the plaintiff. His finger passed through the gap and was injured, and the plaintiff contended that though the adjustment was left to him, it remained the adjustment of the employers. It was held that there was no breach of statutory duty by the employers. Goddard L.J. said[8]: "He cannot take advantage of his "own wrong and say to his employers, 'although you left me "'to adjust it and I did not adjust it, therefore I am going to "'claim damages against you.'" Here the foreman entrusted Stapley and Dale, who were found by the judge to be competent men, to pull the roof down and not to work under it until they had made it safe. The plaintiff cannot blame the employers for negligence, since there is no evidence of it, and she cannot blame them for breach of statutory duty since the breach was solely that of Stapley and Dale, to whom the foreman had given his employers' orders. There was no evidence here that the employers had ignored their duty, as in *Vyner* v. *Waldenberg Brothers Ld.*[9] In *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[10] Tucker L.J. said that different considerations might arise

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[7] [1945] 1 All E.R. 531.

[8] Ibid. 534.

[9] [1946] K.B. 50.

[10] [1947] K.B. 641.

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in a case where there was no breach of statutory duty on the part of the employers, the workman having himself failed to adjust adequately a properly constructed guard and there being adequate supervision at the factory. Assuming, without deciding, that any question of contribution by the employers could arise under the Act of 1945 in such a case, the blame might be apportionable as to 90 per cent. on the workman. It is submitted that on the facts given—similar to those of *Baveystock's* case [11]—it is difficult to see how any question of contribution could arise; but if it could, it is submitted that the contribution of the employers should not be 100 per cent. but merely nominal. [*Beal* v. *E. Gomme Ld.*[12] was mentioned.]

E. Martin Jukes for the plaintiff. There was here no delegation of authority by the employers. The order given by Church, the foreman, to Stapley and Dale was not delegation of authority. The employers remained liable under regulations 7 (3) and 14 (1) to see that the roof in the mine was rendered secure. That was an absolute duty. And, as the trial judge found, they were vicariously liable both for the negligence and similar breach of statutory duty on the part of Dale. Damages, therefore, were rightly given against the employers, but they should not have been halved. The plaintiff has cross-appealed on this issue. The two men had tried to bring down the roof by the use of the pick, but this they had failed to do. The only course then was to get it down by shot-firing. Dale was a borer and it would be his job to procure a shot-firer. It is submitted that on the evidence the order was given only to Dale, who was a borer. On this ground Dale was the person at fault and, therefore, vicariously the employers. The plaintiff was entitled to full damages.

[Counsel then contended, on the evidence, that Sellers J. was wrong in his finding that there was no lack of supervision and that the foreman Church should have waited and assisted Stapley and Dale until the roof had been brought down. He also referred to the facts of *Shotter* v. *Green*, a case where negligence at common law was alleged in which judgment was given by Lynskey J. on March 9, 1951, where the judge had given damages against the employers but had halved them owing to the contributory negligence of the plaintiff. The case had not been either noted or reported.]

Percy Lamb Q.C. replied.

Cur. adv. vult.

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[11] [1945] 1 All E.R. 531.

[12] [1949] W.N. 235; 65 T.L.R. 543.

April 7. SINGLETON L.J. It is not clear to me whether the finding of the judge was based on negligence or on breach of statutory duty. It is clear that at the time of the accident both Stapley and Dale were acting contrary to the order of the foreman Church and in breach of the regulations. The order given by the foreman was to ensure that regulation 7 (3) was complied with; it was a direction under regulation 14 (1) and was fully understood by both men. In disregarding it the two men were in breach of regulation 15 (1) and (3). The foreman's report (made under regulation 14 (5)) contained the words: "men warned of roof "and told to dress down and make safe." He said that he made this report before he was called to the scene of the accident. Apart from the regulations, it was clear from the evidence that no man ought to work under a roof such as this had been found to be or after this order had been given by the foreman.

What, then, was the cause of Stapley's death? It can be put in more than one way. It was caused by a fall of roof at the place at which he was working. He and his companion knew of the condition of the roof and had been given an order to bring it down. In deciding on the course they took they acted in disregard of the regulations and in disobedience of the order, and in going to work under that roof in its dangerous condition Stapley was exposing himself to the very danger which regulations 7 (3) and 15 (3) are designed to avoid. Thus it can fairly be said that Stapley's death was brought about by his breach of the regulations, and, particularly, by his going to work under a faulty roof after the order which had been given. Sellers J. considered that it was equally through the act of Dale, and on that ground he held that the employers were responsible in the action to the extent of one-half of the damages which would have been recoverable if Stapley had not been at fault.

I will consider the claim based on negligence first. Stapley and Dale, having failed to get the roof down with a pick, decided to carry on. "It was an agreement between us," said Dale. The judge found that they had abandoned any attempt to bring down the roof and had agreed together to carry on with their work. How, then, can there be any question of negligence between the two? There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the injured party, and not merely to others. Stapley by his agreement, or arrangement, with Dale appears to me to have absolved Dale from any duty

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of care towards him in regard to this roof. I do not think that if Stapley had suffered injury as a result he could have recovered damages against Dale in an action based on negligence, and a claim against the employers on the ground of negligence by Dale would meet with the like answer. For those reasons I do not consider that the claim can succeed in so far as it is based on negligence.

The claim based on breach of statutory duty presents more difficulty. In *Smith* v. *A. Baveystock & Co. Ld.*[13] the court had to consider a claim by an experienced circular saw operator, one of whose fingers passed under the guard and was injured. It was contended on his behalf that though the adjustment of the guard was left to him it remained the adjustment of the employers, for which they must take the responsibility if the operator suffered injury thereby. The court concluded that there had been no breach of statutory duty, but it is interesting to see that Goddard L.J., in the course of his judgment, said of the plaintiff [14]: "He cannot "take advantage of his own wrong and say to his employer: "'Although you left me to adjust it and I did not adjust it, "'therefore I am going to claim damages against you.'" And du Parcq L.J. said,[15] on the assumption that there had been a breach of statutory duty: "I think they are entitled to say: 'The "'fault is really yours and not ours. We were quite entitled to "'rely on you. True, if somebody else had been injured by any "'failure on your part to fulfil your obligation we should have "'had to pay the penalty, we should have been responsible to "'him. We cannot rid ourselves of our obligation. But it is "'quite absurd to think that if you, who are really the person "'to blame because you were reasonably and properly entrusted "'by us with this duty, failed to carry it out, therefore, we have "'got to pay damages to you.'" Stapley and Dale were both men of experience; they knew what was to be done, and they knew how to do it; they did not need supervision. If Stapley alone had been responsible for the breach of statutory duty, I think it is clear that his widow could not have recovered damages, but it is said that the accident was due equally to the conduct of Dale, and that for that the employers are responsible. It is true to say that no one can waive the performance of a statutory duty. Still, is a man who is injured through breach of a duty which he owes to all others working in a mine in a better position as against his employers if he can say: "Yes, I acted in complete

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[13] [1945] 1 All E.R. 531.

[14] Ibid. 534.

[15] Ibid. 535.

" disregard of the regulations and I did so in agreement with " another employee "? It ought not to be so. If 10 men working together in a mine come to an arrangement that they will pay no heed to statutory regulations, and all 10 are injured as a result of a joint breach, are they all entitled to damages against the mine owners? I cannot help feeling that if such a position arose damages ought not to be recoverable, for the injuries were the result of an illegal agreement, or of an agreement to do something in breach of regulations made for the safety of all persons working in the mine. However, no such point as this was pleaded or argued. Mr. Lamb submitted that the death of Stapley was caused by his own breach of statutory duty, and that it mattered not that another man was a party to the breach. Each was an experienced man, and each owed a duty to himself and to the employers, as well as to other workmen. Each was under a duty to report. Moreover, Stapley himself went into the place of danger and was killed. That was a further breach of duty by Stapley, it was said, and the fact that the two men had decided to leave the roof and continue with their ordinary work did not affect the position.

There is great force in this submission. On the other hand, it is claimed that the employers (through Dale) were in breach of regulations, or of their statutory duty, as the judge found. If this is the right view, it becomes necessary to consider section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945. Fault in that section includes breach of statutory duty, and thus, if the plaintiff has a right of action to damages, the damages recoverable are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The action is against employers, and questions arise beyond those which normally arise when it is a case of deciding the responsibility of the drivers of two motor-cars which have come into collision. One has to consider the responsibility of a man who was properly entrusted with the performance of a statutory duty and who decided not to perform it. Can it be said that his responsibility is less because his decision was arrived at by arrangement with a man of equal rank? There was nothing more the employers could reasonably be expected to do. As between Stapley and them the responsibility for the damage was surely on Stapley, unless it can be said that it was reduced to some small extent because of the agreement between him and Dale. I do not see that it can be right to say that Stapley's responsibility is only one-half. I should regard him as wholly, or almost wholly, responsible in considering the position as between him and the employers, and if I had to decide the question under section 1 (1) of the Act of 1945 I should not place more than a nominal proportion of the responsibility on the employers, though I observe that Tucker L.J. in *Cakebread* v. *Hopping Bros. (Whetstone) Ld.*[16] appears to have thought that in such circumstances 90 per cent. of the blame might fall on the workman and 10 per cent. on the employer. I appreciate that there is a statutory duty upon the employers, but if they have properly placed upon the employee the task of performing it, and the failure is his, I do not see why their proportion of the responsibility should be more than nominal. To place a higher proportion on them would not seem to be just and equitable. Thus, whichever way I look at the case, I feel that the claim ought not to succeed, for nominal damages would not help the plaintiff.

In *Caswell* v. *Powell Duffryn Associated Collieries*[17] Lord Wright, having described an action for breach of statutory duty as a common law action based on the purpose of the statute to protect the workman, and as belonging to the category often described as strict or absolute liability, said, in speaking of contributory negligence as a defence to such an action[18]: "If the "matter had been free from authority, I should, I think, have "thought it simpler to hold that a workman's claim for injury "caused by breach of the employer's statutory duty to fence and "like duties, is only barred by blameworthy conduct on the man's "part of such gravity and so directly causing the accident as in "the judgment of the judge or jury to be properly described as "the substantial cause of the accident and to shift the responsibility to him." The conduct of Stapley appears to me to fall within these words. Moreover, Stapley acted in breach of the regulations, and it was his act, in working under the faulty roof, after the order which had been given to him, which brought about his death.

The plaintiff's position in this action is just the same as would have been that of her husband if he had survived and had brought an action against his employers, and the more I consider it the more I am driven to the conclusion that the action ought not to succeed. I do not overlook the fact that the two men had decided to get on with their work in the belief (or in the hope) that the roof would not fall. The regulations are for the general safety of those who work in a place of this kind, and if two men of equal status arrange to disregard them and injury results to one as a consequence, he cannot blame his employers; it is his fault and not theirs; the real cause of the injury is not their breach of statutory duty; it is his.

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[16] [1947] K.B. 653.

[17] [1940] A.C. 152.

[18] Ibid. 178.

For the reasons I have given I would allow the appeal of the defendants and dismiss the cross-appeal of the plaintiff, as to which I need say nothing further having regard to the view I have expressed. In my opinion, judgment should be entered for the defendants.

BIRKETT L.J. Both appeals are concerned with the same questions and may be thus stated: On the facts of this case, are the defendants liable to the plaintiff, and, if so, for what amount of damages?

The claim was made for damages for negligence and breach of statutory duty, and in the particulars delivered with the statement of claim the allegations of negligence and breaches of statutory duty were fully set out under nine separate headings. The statement of claim was amended when the final speech of counsel for the plaintiff was nearing its close, and was made at the suggestion, and, indeed, the insistence of the trial judge. Mr. Jukes had submitted that the amendment was not necessary, but ultimately asked leave to amend. That amendment indicates very clearly the view taken by the judge, and reads in this way: "The said Dale, their" (the defendants') "servant failed to "bring down the roof by firing or boring holes for firing and/or "failed to report to the said Church his inability to bring down "the said roof." The liability of the defendants is thus founded by the judge on the breach of duty by Dale, although he held that the breach of duty by Stapley deprived the plaintiff of half the amount of damages she would otherwise have been awarded.

The first important question to be answered is whether the breach of duty in the circumstances of this case can give a cause of action to the plaintiff against the defendants. It is submitted by Mr. Lamb for the defendants that the breach of duty by Dale cannot do so. Sellers J. found that Dale and Stapley were equal in status, and that one of them was not in charge of the other. He also found that they were working together; that they were both responsible for the events which happened; that Stapley by his own act brought about the loss which his widow and children suffered, but equally so did the act of Dale; and that either of

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them could have avoided this accident if they had done that which it was proper for them both to do. He came to these findings because he was satisfied that both men had seen that the roof was "drummy," and they both understood that it was their job to obey the order of Church to "fetch it down" in order to make the roof safe. The judge said: "It seems to me that the real "fault bringing about this most regrettable accident was the "conduct of both Stapley and Dale in failing to do that which "the foreman Church had told them to do; or, if they could not "have done that, in failing to report to Church that they could "not bring it down; or perhaps more important still, in deciding "together to continue their work with the roof in the state in "which they knew it to be." On this last point, which the judge thought was "perhaps more important still," he said: "It seems "to me that when Stapley, having discussed the matter with "Dale and decided to continue his ordinary work . . . and when "he did that he went on to work in a place which was not made "secure, and that there was in fact a breach of regulation 7 (3), "but it was a breach, of course, brought about by the act of "Stapley himself . . ." Both men were presumed to know the regulations, and the evidence of Dale supports and confirms this.

I am of opinion that had the facts of the case been that Stapley *alone* was concerned in the events that happened, the plaintiff could not have succeeded in her action against the defendants. The breach of statutory duty by the defendants would have been a breach solely because of the breach by Stapley to whom the statutory duty had been properly delegated. His failure to obey the lawful orders of Church, the foreman, to bring the "drummy" roof down, or to report the actual state of affairs to Church, and to avoid working under the roof until it had been brought down, would have defeated the plaintiff's claim altogether. At one stage of the case Mr. Jukes conceded this, but was later inclined to withdraw from his concession. The defendants, in my opinion, would not be liable to the plaintiff, because the breach of duty complained of in the employers was the breach of duty by Stapley himself.

In *Gallagher* v. *Dorman, Long & Co. Ld.*,[19] Wrottesley L.J., delivering the judgment of the court, which was composed of Lord Greene M.R., Lynskey J. and himself, said [20]: "Where, however, "the person injured as a result of the breach of the statutory "duty is the employee to whom the employer has properly

[19] [1947] 2 All E.R. 38.

[20] Ibid. 41.

"delegated the performance of that duty, and the breach of duty "is caused by the act or omission of such employee, such employee "cannot be heard to say that his injury was caused by the breach "of the statutory duty and not caused by his own act or omission: "*Smith* v. *A. Baveystock & Co. Ld.*"[21]

In claims for breach of statutory duty against employers, if the person injured or killed was himself the actual offender, the employers would not be liable to him or to his representatives. Further, contributory negligence is a defence to a claim against an employer for breach of statutory duty (though since June 15, 1945, the defence may be limited); and, of course, in any particular case the contributory negligence may not be co-extensive with the breach of duty.

Various cases were referred to in the argument before us; in particular, the case of *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*,[22] a decision of the Court of Appeal upholding the decision of Lawrence J. Scrutton L.J. said[23]: "As to the question of "law, in my opinion this court is bound by its own decision in "*Dew* v. *United British Steamship Co. Ld.*,[24] in which all the "members of the court, as I read the judgments, stated that "contributory negligence of a plaintiff was a defence to an action "for an admitted breach of a statute."

Then the Lord Justice said[25]: "Holding as I do that there "was evidence on which the learned judge could find that there "was contributory negligence on the part of the plaintiff, and "not therefore being able to interfere with his decision to that "effect, I am still less able to interfere with it when he adds that "the act which he has found to be negligent was also in breach "of definite instructions. For these reasons, I think the learned "judge came to the right conclusion when he declined to give "the verdict for the plaintiff on the ground that the damage of "which the plaintiff complained was substantially caused by his "own contributory negligence and breach of instructions."

In *Cakebread* v. *Hopping Bros. (Whetstone) Ld.*[26] is the passage to which my Lord has already made reference, and I only refer to it for this reason, that in that case there is a note in the headnote which reads: "*Per* Tucker L.J.:—Different considera-"tions might arise in a case where there was no breach of "statutory duty on the part of the employers, the workman

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[21] [1945] 1 All E.R. 531.

[22] [1934] 2 K.B. 132.

[23] Ibid. 145.

[24] (1928) 98 L.J.K.B. 88; 139 L.T. 628.

[25] [1934] 2 K.B. 149.

[26] [1947] K.B. 641, 653.

"having himself failed to adjust properly a properly constructed "guard and there being adequate supervision in the factory. "Assuming, without deciding, that any question of contribution "by the employers could arise under the Act of 1945 in such a "case, the blame might be apportionable as to 90 per cent. on "the workman"; and it is quite plain from that case, and from another case which Tucker L.J. decided, namely, that of *Beal* v. *E. Gomme Ld.*,[27] that in that case Tucker L.J. was emphasizing the importance of the Law Reform (Contributory Negligence) Act, 1945, as it might conceivably affect these cases; and the Lord Justice said in that case[28]: "I do not think it necessary "to express a view as to the effect, if any, of regulation 23. I "think that the plaintiff was guilty of negligence which contri"buted very materially to the injuries that he suffered. I do "not think that it is a 99 per cent. case," for the reasons which he gave.

So, in addition to the passage cited by my Lord from *Cakebread's* case,[29] where the Lord Justice had spoken about a 90 per cent. responsibility on the part of the plaintiff, in *Beale's* case[30] he also had in mind what my Lord referred to as the nominal damages against the employers which might amount to one per cent., and all that would appear, in his view, to turn upon the meaning of the Act of 1945.

I am further of opinion that if both Stapley and Dale had been killed in the circumstances of the present case in doing together what Stapley did alone when he resumed work under the roof, and the widows of Dale and Stapley had brought separate actions against the defendants, both actions would fail. On the findings of fact by Sellers J. both actions could not be distinguished from a case where only one man was concerned, and where that man was solely responsible for the breach of duty. On the decision of Sellers J. in the present case it would seem that both widows could recover half of the damages suffered, the widow of Dale alleging breach of statutory duty by the employers through Stapley, and the widow of Stapley alleging breach of statutory duty through Dale; but both widows failing to recover the whole amount because of the particular breach of duty by Stapley and Dale in resuming work under the still "drummy" roof that they had failed to fetch down. The passage in the judgment that would seem to bring about this result is: "Substantially the employers here are responsible for "the negligence of their servant Dale in this matter, and the "result, as I see it, is that the accident to Stapley was brought "about by the *separate* acts of negligence of himself and Dale, "and that both he and the employers must be held responsible "therefor." This passage is a little obscure.

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[27] [1949] W.N. 235; 65 T.L.R. 543.

[28] 65 T.L.R. 546.

[29] [1947] K.B. 641.

[30] [1949] W.N. 235.

It may mean that Sellers J. is saying that the negligence of Dale was the reason why the roof fell, and the death of Stapley was due to the fall of the roof; but that Stapley's negligence was to be found in his working under the roof at the time the roof actually fell; or it may mean that Stapley's disobedience to the orders of Church to fetch the roof down and Dale's disobedience in the same matter are to be regarded as "separate acts" and they are both equally responsible for the fact that Stapley resumed work under a "drummy" roof, but Stapley was additionally responsible for resuming work under the "drummy" roof.

It is necessary to use words with some precision of meaning when considering the cause of this accident to Stapley. It may be said that the fall of the roof was the "cause" of the accident, and that fall was due to the disobedience of Dale to the orders of Church, for had he obeyed the order and brought the roof down no accident would have happened; and therefore Dale cannot be dismissed from any consideration of the "cause" of the accident. The amendment of the statement of claim makes the defendants responsible for Dale's failure to bring the roof down and his failure to report, although the judge says in his judgment: "I think that is so; I think he (Dale) did, but I "think also so did Stapley . . . and the employers must be held "to some extent liable for it." He was there referring to the breach of regulation 7 (3).

There is no doubt that in this case the men were charged with the statutory duty jointly, and the judge so finds. Whatever may be attributed to Dale by way of breach of duty can be attributed to Stapley with equal force. If Stapley had not failed in his statutory duty the "drummy" roof would have been brought down whatever Dale did or did not do. Why, then, because one of the two men is killed should the breach of duty be attributed to Dale, the survivor, in order to make the employers liable? It was a joint duty, not the duty of Dale alone; but by the amendment the judge indicated that he was deciding the case as though Stapley had nothing to do with the breach of duty that resulted in the "drummy" roof being left without being brought down, though he recognized that Stapley was equally to blame.

The two men had mutually agreed to disobey the orders of Church, and in so doing committed offences against the Metalliferous Mines Regulation Acts of 1872 and 1875, punishable by fine and imprisonment. It seems to me to be impossible to say that the employers were guilty of a breach of statutory duty because of the default of Dale, without saying in the same breath that they were at the same time guilty of the same breach because of the default of Stapley.

But I think this appeal can be decided on another ground. It seems clear that if the inquiry to be made is: What was the cause of Stapley's death? then the answer must be that it was his own breach of duty in resuming work under the "drummy" roof. If he had not done that, it is obvious that he would not have been killed. The contributory negligence of Stapley would be a good defence to a claim made against the employers for breach of statutory duty, and it would have to be considered whether there was any other contributory cause. Lord Wright said in *Caswell's* case [31] that some carelessness or inattention is not enough, for then the breach of the statute is the effective cause of the injury. But in the present case the effective cause of the death was because Stapley resumed work in breach of the order given by Church, with knowledge that the "drummy" roof had not been brought down, but with the knowledge that "drummy" roofs were dangerous, notwithstanding his erroneous view that because the roof would not come down with the methods he and Dale had employed (and without calling on the shot-firer to bring the roof down) the roof might be regarded as safe. That the roof was in fact dangerous permits of no doubt, for it came down of itself with disastrous results within 30 minutes.

In *Davies* v. *Swan Motor Company (Swansea) Ld.* Denning L.J. said [32]: "The plaintiff's negligence in leaving the obstruction there is a continuous negligence, which continues after the oncoming driver sees it. But the fact that he does see it may mean in some cases that the obstruction is not the cause of the accident. For instance, in the case I have put it is, of course, plain that if the defendant actually saw the parked vehicle in good time and purposely ran into it—or, indeed,

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[31] [1940] A.C. 152, 179–80.

[32] [1949] 2 K.B. 323.

"what comes to the same thing, if he, seeing its position, drove "recklessly on that account, careless whether he hit it or not—"his conduct would be so powerful a factor in producing the "damage that the presence of the parked vehicle would not be "itself a cause of the damage. The sole cause could be the "purposeful or reckless act of the defendant." Then the Lord Justice goes on to deal with the situation if it was not so deliberate. In the case of *Harvey* v. *Road Haulage Executive*[33] Denning L.J. uses the same language, and he adds further words to the same effect.

If the true test is: Who caused the death? (see Salmond on the Law of Torts, 10th ed., at p. 452), then the answer must be: Stapley himself, and Stapley alone. Before the passing of the Law Reform (Contributory Negligence) Act, 1945, no court could have found the defendants liable on these facts: see *Smith* v. *A. Baveystock & Co. Ld.*[34] and *Vyner* v. *Waldenberg Bros.*[35] That Act has said that if the plaintiff's negligence is *one* of the causes of his damage he does not fail altogether; his damages are reduced. The negligence and breach of duty of Stapley are clear. The breach of duty on the part of the employers arises because they delegated the duty to *two* men who deliberately disobeyed the lawful orders of Church, and Stapley was one of them. When the duty is imposed on two jointly its breach is a joint tort. The duty is imposed on employers, and they may delegate it to two jointly. Can it be said that the employers are liable because Dale was guilty of breach of duty, and therefore the defendants are liable to Stapley, who was equally the delegate of the employers and equally the person guilty of breach of duty?

I am of opinion that the effective cause of Stapley's death was his own breach of statutory duty, or, alternatively, his own negligence; and any breach of duty by Dale, even if it should be held that it was Dale's breach of duty that left the roof in a dangerous state, was no contribution to the death of Stapley in any legal definition of that term. Without the fall of the roof, of course, there could have been no death, and in that sense the fall of the roof contributed to the accident. But the view I take is that the breach of duty in not bringing the roof down was equally that of Stapley, and for the purpose of this case may be regarded as solely that of Stapley, when it is the widow of Stapley claiming damages against the defendants; and, in any event, the *cause* of the death of Stapley was the breach of duty in resuming work under the "drummy" roof when he had been ordered not to do so: see *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*[36]

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[33] [1952] 1 K.B. 120.

[34] [1945] 1 All E.R. 531.

[35] [1946] K.B. 50.

I think the appeal of the plaintiff fails altogether. Mr. Jukes submitted that the defendants were in breach of their statutory duty because of inadequate supervision. I think the finding of Sellers J. disposes of this. He submitted that the order of Church to "fetch down the roof" was given to Dale alone and not to Stapley. The evidence is overwhelmingly against any such contention, as is the judge's finding; but it is significant that the submission is made. It follows that the plaintiff is not entitled to succeed for the amount of damages awarded by the judge, and that the damages are not inordinately low, inasmuch as, in my opinion, the plaintiff is entitled to none.

I would allow the appeal of the defendants, and dismiss the appeal of the plaintiff.

MORRIS L.J. There are two ways in which liability is said to fall on the defendants: one is that they were themselves in breach of their statutory duties, and the other is that Dale was in breach of his statutory duties and that the defendants were vicariously liable.

On the findings of fact of the judge there can be no doubt that there were breaches of statutory duty. It becomes necessary to examine what they were and how they arose, and to consider whether any of such breaches caused the death of Stapley. It has been laid down in a series of decisions in the House of Lords that an employer's obligation to comply with statutory provisions for the safety of his employees is, in general, absolute. An employer does not relieve himself of his obligation by showing that he has appointed reasonably competent persons to perform the obligation, but that they failed to do so. Furthermore, as Lord Porter said in *Potts* v. *Reid*[37]: ". . . negligence "is the failure to use the requisite amount of care required by "the law in the case where a duty to use care exists. At "common law the degree required is that expected of the "'reasonable man.' When a statutory duty is imposed, if it "be absolute, the degree required is the fulfilment of the "statutory obligation. If it be not fulfilled the person on whom "the duty is imposed is negligent. . . ."

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[36] [1934] 2 K.B. 132.

[37] [1943] A.C. 1, 31.

In the earlier case of *Lochgelly Iron and Coal Co.* v. *M'Mullan* Lord Warrington said[38]: "Section 49 of the Coal "Mines Act, 1911, is in the following terms:—'The roof and "'sides of every travelling road and working place shall be "'made secure, and a person shall not, unless appointed for the "'purpose of exploring or repairing, travel on or work in any "'travelling road or working place which is not so made secure.' "This involves, it will be noted, an absolute obligation on the "owner to make secure the roof and sides referred to, and a "further obligation that no person shall work in a travelling road "or working place which is not so made secure. As to the law "on the subject of the liability of owners for breach of obligations imposed by statute for the protection of those employed "by them, I think the following propositions are supported by "authority:—(1) If the obligation is to do or abstain from doing "a particular thing and on the construction of the statute the "obligation is created for the protection of a particular class, "e.g., workers in a mine or factory, then a member of that class "injured by the non-performance of the obligation is entitled to "sue the owner in an ordinary action founded on personal negligence. (2) The fact that the obligation has not been performed "is in itself evidence of personal negligence on the part of the "owner. (3) That the owner cannot relieve himself of his "obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on "their part, nor was it open to him at common law to plead "common employment. (4) There appears to be no material "difference in this respect between the law of England and that "of Scotland."

In the same case Lord Atkin said[39]: "If in violation of the "statute the roof was not made secure, the failure to perform "the statutory duty was negligence either of the employer or of "his servants. No one can I think doubt that if the obligation "to observe statutory precautions is imposed upon a servant, the "servant's breach is negligence. The servant would be liable "to his fellow servant for injuries caused by such breach: see "*Lees* v. *Dunkerley Brothers*.[40]"

Now, the facts of the present case show that the defendants were in breach of statutory duty. They did not comply with regulations 14 (1) and 7 (3) of the Metalliferous Mines General

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[38] [1934] A.C. 1, 13.

[39] Ibid. 10.

[40] [1911] A.C. 5.

Regulations, 1938. The roof of the working place was not made secure. The facts as found further show that Stapley and Dale were in breach of statutory duty. They were in breach of the duties in the circumstances imposed upon them by regulation 15, paragraphs (1), (2), (3) and (10).

If negligence or breach of statutory duty is established, it next becomes necessary to consider whether the death of Stapley was caused thereby for, as Lord Macmillan said in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[41]: "The "mere fact that at the time of an accident to a miner his "employers can be shown to have been in breach of a statutory "duty is clearly not enough in itself to impose liability on the "employers. It must be shown that the accident was causally "associated with the breach of statutory duty."

The defendants, Gypsum Mines Ld., being a limited company, could only perform their duties by appointing persons to carry out those duties. In the present case they appointed Dale and Stapley. If Dale and Stapley failed to carry out the duties, it would follow that the defendants failed to comply with their statutory obligations, and if, as a result, some injury were caused to some other person, the defendants would make no answer in law by saying that they had reposed confidence in the reliability and competence of the two men. The problem which is raised in the present case concerns the position of the defendants where, following upon a failure of the two men to do what they were instructed to do, mischance has befallen one of them.

It is a melancholy feature of the case that the facts show, as the judge held, that disaster would not have overtaken Stapley had he and Dale done that which they ought to have done. The matter must be examined and decided on that footing even though the view may be held that Stapley, who was described by the judge as a good, steady workman, may have been well-motivated and may have been urged by zeal for his work. Here was no case of irresponsible, or impetuous, or contumacious conduct. The distressing circumstance remains that he in fact disobeyed an order to dislodge the unsafe roof with the corollary or the implied order not to proceed to do ordinary work under the roof until it was made safe.

I proceed to consider the matter on the basis that it was fitting for the defendants to entrust the task of coping with the unsafe roof to Dale and Stapley. This assumption requires testing in view of some of the submissions advanced on behalf of the plaintiff. If Dale and Stapley were inept, or inexperienced, or ill-qualified to make the roof secure, then different considerations might apply.

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[41] [1940] A.C. 152, 168.

Dealing first with the defendants' breach of their statutory obligations, the matter can fairly be tested by considering the position on the assumption that Stapley alone had been required to make the roof safe, that that was a proper arrangement and that Stapley had been injured but not killed, all other circumstances being as found by the judge. If Stapley had claimed damages and had asserted that he was hurt because the roof was not made secure, he would have been met by the answer that the roof was insecure only because he had failed to carry out a legitimate instruction to him to make it secure. In reason and in common sense it seems to me that such answer would effectively dispose of his claim. If the above assumptions be varied to include, as was the fact, that Dale and Stapley together were told to make the roof safe, then a claim by Stapley would have been met by a similar answer. Would it have availed Stapley to reply that though he may have failed, so also had Dale? On the findings of the judge as to their respective obligations (which findings I see no reason to reject), then, in my judgment, the answer is in the negative. The judge said: "I have considered "the evidence and while, taking their respective duties, one may "have been more highly skilled, I think they were working there "as men of equal status as regards this obligation; one was not "in charge of the other. They were working together, and it "seems to me that they were both responsible for the events "which happened, and, in those circumstances, one can only say "that the man Stapley, unfortunately by his own act, brought "about the loss which his widow and children have suffered, but "equally so did the act of Dale; either of them could have "avoided this accident if he had done that which it was proper "for them both to do."

Accepting these findings as set out in the careful judgment of the judge, I do not find myself sharing the view that the conclusion to be drawn is that as two men were instructed, and as they both failed, the employers should be liable to the extent of one half of the loss suffered by one of them. There were no duties imposed upon Dale which were wider than, or different from, or more extensive, than those imposed upon Stapley. The responsibilities of the two men, as regards making the roof secure, were co-extensive. No greater fault or failure can be imputed to Dale than to Stapley, nor any fault or failure which was not also, and to the same extent, that of Stapley. In these circumstances, in a suit by Stapley the same answer would avail his employers as would have availed them if there had not been anyone jointly appointed with Stapley to make the roof secure.

In my judgment, the cause of Stapley's death was that an insecure roof fell on him. If it can be asserted that the defendants were in breach of statutory duty in failing to make the roof secure, so that the death "was causally associated with the "breach of statutory duty," then the effect and degree of Stapley's contributory negligence would have to be considered. His "share in the responsibility" would require assessment. But before this stage is reached it must be shown that Stapley would (if death had not ensued) have been entitled to sue and recover damages in respect of the defendants' breach of statutory duty. It is relevant to bear in mind the wording of section 1 of the Fatal Accidents Act, 1846: "Whensoever the death of a "person shall be caused by wrongful act, neglect or default, and "the act, neglect or default is such as would (if death had not "ensued) have entitled the party injured to maintain an action "and recover damages in respect thereof, then and in every such "case the person who would have been liable if death had not "ensued shall be liable to an action for damages, notwith"standing the death of the person injured, and although the "death shall have been caused under such circumstances as "amount in law to felony."

In my judgment, Stapley could not have asserted as against the defendants that they were in breach of statutory duty, if the reason for so asserting was that Stapley had neglected to do that which he was properly told to do. Nor could he so assert by saying that someone else shared his fault, if the responsibilities of that other person merely marched with his and did not overlap or overtop them.

It is necessary to consider whether it was legitimate to have detailed Dale and Stapley for the task of making the roof secure. It was pleaded that there was a failure properly to supervise Stapley. As to this the judge said: "I am not of the view that it "was in the circumstances necessary for Mr. Church, who had "other routine duties to do, to remain there and see this work "done. The plea that has been made, that there was a lack of "supervision, is rejected by me on the evidence which has been "given here." From the way in which this topic is dealt with by the judge, I form the view that a somewhat different emphasis upon the matter was placed as the argument developed before us. It was said that Dale had not had experience of boring on the site of a fault, and had not previously had to bring down a faulty roof so located, with the result that on the occasion in question he was presented with a problem to cope with which he was ill-equipped. The testimony of Mr. Mann was to the effect that Dale and Stapley should not have been left on their own to get down the faulty roof, and that they lacked the necessary experience. The evidence of Mr. Church, on the other hand, was that Dale and Stapley had previously coped with a roof in exactly similar circumstances, and that the task he gave them was not beyond the scope of their duties during a normal day's work.

The judge considered the evidence with care, and I think that it must be regarded as implicit in what he holds that he rejected the view that it was not legitimate to have entrusted the duty of dealing with the roof to Dale and Stapley.

It has next to be considered whether the defendants can be held vicariously responsible for breaches of statutory obligation personal to Dale as opposed to those personal to themselves. A convenient way of testing the matter is on the supposition that Stapley, having been injured, but not killed, sued Dale for damages. On the facts as found by the judge, it would seem to be somewhat surprising if Stapley could have recovered against Dale.

In approaching this matter it is desirable to do so, in the first place, by considering whether there is any liability in Dale. It is only if there is some liability in Dale that it becomes necessary to consider the extent of the contributory negligence of Stapley. The opening words of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, are: "Where any person "suffers damage as the result partly of his own fault and partly "of the fault of any other person." The word "fault" is defined in the Act to mean "negligence, breach of statutory duty "or other act or omission which gives rise to a liability in tort "or would, apart from this Act, give rise to the defence of "contributory negligence." It must, accordingly, first be decided whether if Stapley had been injured but not killed, the other facts being as found, he could successfully have sued Dale by asserting that Dale's breach of statutory duty gave rise to a liability in him in tort to Stapley. If it did, then in the present case Stapley's share in the responsibility for the damage might be regarded as so considerable as to reduce Dale's liability to a small fraction of what it otherwise might be. But before any such inquiry is reached it has to be established that there is liability in Dale. Stapley's own conduct has now to be regarded from the point of view of causation. Could Stapley assert as against Dale that he was injured because Dale failed to carry out his statutory obligations? In my judgment, he could not. Dale and Stapley had duties imposed upon them jointly, and there was no failure on Dale's part which was not also and equally a failure on Stapley's part. The result is that Stapley could not point to any omission or dereliction on Dale's part which was not fully and wholly his own, and accordingly he could not assert that Dale had caused his injuries. Stapley would be in the difficulty that he could not prove that it was Dale's error of omission rather than his own error of omission that brought about his injuries.

In giving evidence Dale used the word "agreement" in reference to the event when he and Stapley abandoned the task of bringing down the roof and proceeded with their ordinary work. I do not consider that their "agreement" should be considered as denoting more than their concurrence in a joint decision to abandon their duty to make the roof secure. But thereafter any injury resulting to one or both because the roof was not made secure was no more attributable to the breach of statutory duty of the one than of the other. There was no element of causation emanating from Dale that did not also emanate from Stapley. Neither, therefore, could prove that any injury was caused by the omission of the other. Applying the test approved by Lord Simon in his speech in the *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*),[42] and by Lord du Parcq in his speech in *Grant* v. *Sun Shipping Company Ld.*,[43] the inquiry becomes one as to whether Stapley could show that Dale's breach of statutory duty had anything to do with causing Stapley's injuries. It seems to me that where Stapley's own conduct by way of non-feasance provides a totality of cause, it cannot be demonstrated by Stapley that Dale's non-feasance came into account or had any effect. Stapley could not discharge the burden which would be upon him of proving that his injuries were either wholly or partly caused by Dale. There does not

[42] [1948] A.C. 140, 149.

[43] [1948] A.C. 549, 564.

appear to be evidence of any negligent conduct in Dale other than that comprehended within his breaches of statutory duty. No acts of commission are alleged against him, nor any omissions, beyond those equally and concurrently attributable to Stapley.

For the reasons which I have indicated, I have felt impelled to the conclusion that there could be no recovery at the suit of the plaintiff against the defendant company.

Appeal allowed. Cross-appeal dismissed. Judgment for the defendants.

Solicitors: *Blyth, Dutton, Wright & Bennett, for Menneer, Idle & Brackett, St. Leonards-on-Sea, Sussex; Rowley Ashworth & Co.*

C. G. M.

REGINA *v.* NOTTINGHAM QUARTER SESSIONS AND OTHERS. *Ex parte* HARLOW.

1952
May 14, 15, 23.

Lord Goddard C.J., Jones and Parker JJ.

Local Government—Public health—Collection of refuse—Notice by local authority to householder to provide dust-bin—Notice quashed by court of summary jurisdiction—No order for costs against local authority—Appeal by local authority to quarter sessions—Whether "a person aggrieved"—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss* 75, 301.

Where a local authority in pursuance of its powers and duties as sanitary authority under section 75 (1) of the Public Health Act, 1936, has served a notice and requirement on the owner or occupier of premises for the provision of a dustbin, and a court of summary jurisdiction has set aside the notice without making an order for costs against the local authority, that body is "a "person aggrieved" by the decision of the court of summary jurisdiction within the meaning of section 301 of the Public Health Act, since such decision places on the local authority the legal burden of carrying out its duties in some other way It has consequently a right of appeal to quarter sessions against the order of the court of summary jurisdiction.

Rex v. *London Quarter Sessions*; *Ex parte Westminster Corporation* [1951] 2 K.B. 308, and *Rex* v. *Surrey Quarter Sessions*; *Ex parte Lilley* [1951] 2 K.B. 749, considered and distinguished.

APPLICATION for order of certiorari.

The applicant was the agent of the owner of premises known as 33 Pear Hill Rise in the city of Nottingham. By a notice

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dated April 20, 1951, the Nottingham City Council, pursuant to their powers under section 75 of the Public Health Act, 1936,[1] required the applicant to provide a dustbin for the premises.

The applicant, as he was entitled to do, appealed to a court of summary jurisdiction, which allowed the appeal and ordered that the notice and requirement of the council should be void and of no effect. No order for costs was made against the local authority.

The local authority appealed from that order to Nottingham City Quarter Sessions, who allowed the appeal and quashed the order of the magistrates, leaving the notice and requirement of the council in force.

The applicant moved for an order of certiorari to bring up and quash the order of quarter sessions on the ground that they had no jurisdiction to entertain the council's appeal for the reason that the council were not " a person " within the meaning of section 301 of the Public Health Act, 1936, and in any event were not " a person aggrieved " within the meaning of that section, and accordingly had no right of appeal to quarter sessions.

Elwes Q.C. and *R. D. Lymbery* for the applicant. Quarter sessions had no jurisdiction to entertain the appeal by the local authority since the right of appeal is limited to " persons aggrieved " and the Nottingham City Council are not " persons " within the meaning of section 301 of the Public Health Act, 1936, and, assuming that they were, they were not " aggrieved " by the decision of the court of summary jurisdiction annulling the notice served on the applicant. In *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation*,[2] it was held that the London County Council was not a " person aggrieved " within section 64 of the London County Council (General Purposes) Act, 1947, by an order of a court of summary jurisdiction and had no right of appeal to quarter sessions. The right of appeal is not given to any person " affected " by an order, but only to a person " aggrieved " by it. In *Ex parte Sidebotham* [3] it was said that a person aggrieved must be one who has suffered a legal grievance. In the present case the justices annulled a notice served on the owner of premises pursuant to an administrative discretion given to the council by section 75 of the Public Health Act, 1936, and such annulment cast no legal burden on the council since the Act provides other ways for securing the provision of dustbins without the council itself having to provide them. Further, no order for costs was made against the council by the justices, as was the case in *Rex* v. *Surrey Quarter Sessions; Ex parte Lilley*,[4] where it was held that such an order constituted a grievance. The *Surrey* case [4] is not an authority for the proposition that the council are " persons " in the present instance. There the court was construing sections 300–302 of the Public Health Act, 1936, in the light of the Nurseries and Child-Minders Regulation Act, 1948, in which they were incorporated, and not with reference to the Act of 1936 as a whole, but in the present case sections 300–302 must be construed with section 75 of the Public Health Act, 1936. For the above reasons it is submitted that an order of certiorari should not be made. [They also referred to *Reg.* v. *Hannam and Others, Justices, and the Ramsgate Smackowners' Ice Co.*[5]]

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[1] Public Health Act, 1936, s. 75 (1): " A local authority who, as " respects their district or any part " thereof, have undertaken the re- " moval of house refuse may require " the owner or occupier of any build- " ing within the district . . . to " provide such number of covered " dustbins for the reception of house " refuse of such material, size and " construction as the authority may " approve; . . . Any person " aggrieved by a requirement of the " local authority under this sub- " section may appeal to a court of " summary jurisdiction."

Section 301: " Subject as herein- " after provided, where a person " aggrieved by any order, deter- " mination or other decision of a " court of summary jurisdiction " under this Act is not by any other " enactment authorized to appeal to " a court of quarter sessions, he may " appeal to such a court: . . ."

[2] [1951] 2 K.B. 308.

A. P. Marshall Q.C. and *M. H. Jackson-Lipkin* for the respondents. Quarter sessions had jurisdiction to entertain the appeal by the local authority, who were not only a " person " but a " person aggrieved " within the meaning of section 301 of the Public Health Act, 1936. On the question whether they were a " person " it is submitted that *Rex* v. *Surrey Quarter Sessions; Ex parte Lilley*,[6] is a conclusive authority in favour of their so being, and the only question, therefore, is whether they were " aggrieved " by the order of the justices revoking the notice and requirement served on the agent of the owner of the premises concerned. It is submitted that although no order for costs was made against the council as in the *Surrey* case,[6] where the fact that such an order was made was the ground of the court's decision that the council were " aggrieved," they were none the less aggrieved by the order of the justices. (As to the circumstances in which a person can be said to be " aggrieved," see *Ex parte Sidebotham* [7]; *Ex parte Official Receiver, in re Reed,*

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[3] (1880) 14 Ch.D. 458.

[4] [1951] 2 K.B. 749.

[5] (1885) 2 T.L.R. 234.

[6] [1951] 2 K.B. 749.

[7] 14 Ch.D. 458.

Bowen & Co.[8]; *Sevenoaks Urban Council* v. *Twynam.*[9]) Under the general scheme of the Public Health Act, 1936, and in particular under sections 72 and 302, the local authority, as the result of the justices' order, would be compelled to take other administrative action either by serving notices on the tenants of the properties concerned requiring them to provide dustbins or by themselves providing them, which would mean that they would have to go to the trouble of putting the cost on the general rate. In such circumstances the local authority is clearly "aggrieved" by the justices' order and as a "person aggrieved" has a right of appeal to quarter sessions against the order.

Elwes Q.C. in reply.

Cur. adv. vult.

May 23. Parker J. read the judgment of the court, which, after stating the facts, continued:—As regards the first contention that the council is not a "person" within the meaning of section 301 of the Public Health Act, 1936, the court is clearly of opinion that the council is a "person" within that section. Indeed, the matter is concluded by the decision of this court in *Rex* v. *Surrey Quarter Sessions; Ex parte Lilley.*[10] It is true that in that case the court was considering another Act, the Nurseries and Child-Minders Regulation Act, 1948, but by section 6 (5) of that Act sections 300–302 of the Public Health Act were made to apply, and the court had to construe section 301 of the latter Act, and held that the local authority was a "person" within that section.

The other question, namely, whether the council was "a "person aggrieved" is more difficult, since the court of summary jurisdiction merely allowed the applicant's appeal and did not make any order for costs against the council. Had such an order been made, then clearly, as was held in the *Surrey* case,[10] the council would have been "aggrieved."

In approaching this question it is important to bear in mind what Lord Hewart C.J. said in *Sevenoaks Urban Council* v. *Twynam*[11]: "Now undoubtedly those words 'a person aggrieved' "have very often been considered, and, if one looked at the mere "terms apart from their context and apart from the particular "circumstances, it would have been quite easy to marshal "decisions of contradictory import. But as has been said again "and again there is often little utility in seeking to interpret

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[8] (1887) 19 Q.B.D. 174.

[9] [1929] 2 K.B. 440.

[10] [1951] 2 K.B. 749.

[11] [1929] 2 K.B. 440, 443.

"particular expressions in one statute by reference to decisions "given upon similar expressions in different statutes which have "been enacted alio intuitu. The problem with which we are "concerned is not, what is the meaning of the expression "'aggrieved' in any one of a dozen other statutes, but what is "its meaning in this part of this statute?"

Turning then to the Public Health Act, 1936, it is to be observed, without going through the Act in detail, that numerous powers are given, and duties and burdens imposed, on local authorities. They can make a variety of requirements, refusals, decisions and determinations, and from these the member of the public concerned is given a right of appeal to courts of summary jurisdiction, which, by section 300, is to be by way of complaint. Local authorities are also given the right to sue in such courts for expenses. It is from decisions of courts of summary jurisdiction in all such matters, in some of which the local authority will have been a defendant to a complaint, and in others a plaintiff, that a right of appeal to quarter sessions is given by section 301. [His Lordship read the section.] Prima facie, a local authority who has either gone to a court of summary jurisdiction as plaintiff, or has been brought before such a court as defendant to a complaint and has failed is, one would have thought, in common parlance, a person aggrieved.

Turning next to the sections of the Act concerning a local authority's powers and duties as sanitary authority, one finds that by section 72 the local authority, if so required by the Minister, as was the case here, is charged with the duty of and can be compelled to remove house refuse, for which purpose dustbins are clearly necessary. By section 75 (1) the local authority can require an owner or an occupier of premises to provide dustbins, and a right of appeal to a court of summary jurisdiction is given to a person aggrieved by such a requirement. Provision is also made empowering the local authority themselves to provide dustbins, and to make an annual charge therefor.

Accordingly, once the court of summary jurisdiction in the present case had declared null and void the notice and requirement to the applicant, as agent for the owners, to provide a dustbin, the council would have to fulfil its duties in some other way. It would either have to provide a dustbin itself or serve a notice on the occupier requiring him to do so with the risk of being taken by the occupier to the court, and having to incur, and possibly to pay, costs. In other words, the council is left with a legal burden which, if the order of the court of summary jurisdiction had not been made, the council would have discharged. In these circumstances the council is, in our view, "a person aggrieved."

Reference, however, was made in the course of the argument to a number of cases, and in particular to *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation*,[12] and to *Rex* v. *Surrey Quarter Sessions; Ex parte Lilley*,[13] which it is said require us to hold that the council was not "a person aggrieved." In the *Westminster* case [12] the court had to consider a private Act empowering borough councils to register street traders and to grant, renew, vary and revoke licences to street traders. A trader had a right of appeal to a court of summary jurisdiction and from an order of that court "any person deeming himself aggrieved" could appeal to quarter sessions. In that case the Westminster Corporation cancelled the registration of certain street traders. They appealed to a metropolitan magistrate, who reversed the cancellations and the corporation sought to appeal to quarter sessions. This court held, not only that as a matter of the construction of that Act the corporation was not "a person," but that in any event it was not "a person aggrieved." That case, as it seems to us, is clearly distinguishable. The cancellation of the registration cast no legal burden on the corporation and, while it might have been annoyed or disappointed by the magistrate's decision, it was not aggrieved thereby.

In the *Surrey* case,[13] the Act in question was the Nurseries and Child-Minders Regulation Act, 1948, under which a woman who carried on a nursery school at certain premises applied to the Surrey County Council to be registered. The council made an order refusing to register her except subject to conditions and she appealed to a court of summary jurisdiction, which held that the Act did not apply to the premises in question; that the council accordingly had no power to make the order in question, and made an order for costs against the council. The Act incorporated section 301 of the Public Health Act, 1936, and the council appealed to quarter sessions. This court held that the council in that case was a person aggrieved since an order for costs had been made against it, but it is clear from the judgments that, but for this order for costs, the court would have held to the contrary. That case also is, in our view, distinguishable and for the same reasons. The cancellation of the council's order did not result in any legal burden being cast on the council.

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[12] [1951] 2 K.B. 308.

[13] [1951] 2 K.B. 749.

Reliance was placed in both the *Westminster* case [12] and the *Surrey* case [13] on *Ex parte Sidebotham* [14] and *Reg.* v. *Keepers of the Peace and Justices of the County of London*,[15] but neither of these cases seems to us to conflict in any way with the view we have formed in the present case. Indeed, in *Ex parte Sidebotham*,[16] James L.J. said: "But the words 'person aggrieved' "do not really mean a man who is disappointed of a benefit which "he might have received if some other order had been made. A "'person aggrieved' must be a man who has suffered a legal "grievance, a man against whom a decision has been pronounced "which has wrongfully deprived him of something, or wrongfully "refused him something, or wrongfully affected his title to something"; and we think that the council in the present case can be said to come within that definition. But in any event it is to be observed that, as Lord Esher M.R. pointed out in *Ex parte Official Receiver, in re Reed, Bowen & Co.*,[17] that definition does not purport to be and is not an exhaustive definition.

The only case which has caused doubt in our minds is *Reg.* v. *Hannam and Others, Justices, and the Ramsgate Smackowners' Ice Co.*[18] In that case the corporation of Ramsgate rated the Ramsgate Smackowners' Ice Co. in respect of certain premises. The company failed to pay and the corporation took out a summons for an order for payment. The magistrates refused to make the order on the ground that by reason of certain local Acts the premises were exempt from rates. A rule nisi for a mandamus was made absolute by the Queen's Bench Division to compel the magistrates to make an order for payment on the ground that they had no power to inquire into the validity of the rate since the company not having appealed to quarter sessions against the rate it was good on its face. In dismissing the appeal the Court of Appeal had to consider whether the corporation could have appealed under section 269 of the Public Health Act, 1875, against the magistrates' decision since, if so, a mandamus would not have been the proper remedy. On that matter Lord Esher M.R. said [19]: "But that section only applied to a person "aggrieved—that was a person against whom an order was made "throwing a burden upon him—and it did not give an appeal to "a rating authority."

No argument on this point is set out in the report, nor is the

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[12] [1951] 2 K.B. 308.

[13] [1951] 2 K.B. 749.

[14] 14 Ch.D. 458.

[15] (1890) 25 Q.B.D. 357.

[16] 14 Ch.D. 465.

[17] 19 Q.B.D. 174, 178.

[18] 2 T.L.R. 234.

[19] Ibid. 236.

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passage cited above easy to follow. The corporation were plaintiffs who had failed before the magistrates and we should have thought were "aggrieved" within the definition of James L.J. in *Ex parte Sidebotham.*[20] It may be that the real point taken was that the corporation was not "a person" within section 269 of the Public Health Act, 1875. The requirement in sub-paragraph (2) of that section that the appellant should give notice to the authority lends support to the view that the corporation could not appeal. It is enough, however, for us to reiterate the words of Lord Hewart C.J. in *Sevenoaks Urban Council* v. *Twynam*[21] and to consider, as we have to, the position under the relevant provisions of the statute in question in this case.

This application must be refused.

Application refused.

Solicitors: *Peacock & Goddard, for Browne, Jacobson & Hallam, Nottingham; Sharpe, Pritchard & Co., for T. J. Owen, Town Clerk, Nottingham.*

P. B. D.

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[20] 14 Ch.D. 458.

[21] [1929] 2 K.B. 440, 443.

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April 23,
24, 25.

Singleton,
Denning and
Hodson L.JJ.

JONES *v.* LIVOX QUARRIES LD.

SAME *v.* SAME.

Negligence—Contributory negligence—Causation—Private roadway—Plaintiff riding on back of vehicle contrary to defendant employers' orders—Injured by following vehicle of defendants—Whether plaintiff's so riding a cause of his injuries—Law Reform (Contributory Negligence) Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 28), *ss.* 1 *and* 4.

In a quarry at the lunch hour the workmen and a few slow-moving vehicles were proceeding down the base of the quarry to the canteen The way was round a stationary excavator vehicle, turning almost at a right angle. A traxcavator, a tracked vehicle with a speed of 2½ miles an hour turned this corner and stopped or nearly stopped to change gear. The plaintiff had jumped on to this vehicle and then stood on the towbar at the back of it holding on to two uprights very much in the position in which a footman stood at the back of an eighteenth century carriage, so that some part of his body was behind the traxcavator. The workmen at the quarry, including the plaintiff, had been instructed not to ride on the quarry vehicles and, in doing so, the plaintiff acted in defiance of his orders. A dumper, a vehicle with a speed of 4½ to 5 miles an hour driven by a servant of the defendants, the quarry owners, with a load of stone, followed the traxcavator a few seconds later round the stationary excavator and crashed into the back of the traxcavator and the plaintiff was severely injured.

On the issue whether the plaintiff, by taking up this position on the traxcavator contrary to his orders in part caused his injury in that he suffered "damage as the *result* partly of his own fault" within the meaning of ss. 1 (1) and 4 of the Law Reform (Contributory Negligence) Act, 1945, it was contended that the fact that he was exposing himself to a risk in travelling in a dangerous place, in defiance of his employers' order was nihil ad rem; it had as little to do with the cause of the injury as if the plaintiff had been shot by the negligence of a man shooting game in the neighbourhood. And it was observed that the trial judge had said: "This was a vehicle with tracks, not a vehicle with wheels, and "it seems to me that in doing that, any man was running the risk, "in travelling somewhere which was not a proper place to travel, of "being thrown off—that is I think the risk which he ran and no "other."

Held, that the plaintiff had suffered "damage as the result partly of his own fault," *i.e.*, that it was caused partly by his own fault within the meaning of ss. 1 (1) and 4 of the Law Reform (Contributory Negligence) Act, 1945. *Davies* v. *Swan Motor (Swansea) Ld.* [1949] 2 K.B. 291, considered and applied.

Decision of Hallett J. affirmed.

APPEAL by the plaintiff and cross-appeal by the defendants from a judgment of Hallett J. given at Cardiff Assizes.

The plaintiff, aged 42, had been employed by the defendants for about three years, originally at a quarry and then on a machine which bored into a cliff to bring down material. On February 28, 1951, at 1 p.m. at the defendants' quarry, the whistle was blown for the workmen employed by the defendants to break off work and make their way through the quarry down to the canteen. The route was to go round a stationary excavator vehicle turning almost 90 degrees to the left. The driver of a traxcavator (a tracked vehicle, the speed of which was about 2½ miles an hour) who sat at the back of the machine, drove his machine along this route. A traxcavator did work of a similar kind to that done by an excavator. The plaintiff jumped on to the back of the traxcavator, standing on the towbar at the back and holding on to two uprights, very much in the position in which a footman stood at the back of an eighteenth century carriage, so that some part of his body was behind the traxcavator. The workmen at the quarry, including the plaintiff, had been instructed not to ride on the quarry vehicles, and, in doing so, the plaintiff acted in defiance of his orders. Just after the traxcavator had rounded the excavator and turned sharply to the left the driver stopped or nearly stopped his vehicle in order to change gear. The plaintiff was standing close behind the driver of the traxcavator, but the driver said that he did not know that the plaintiff was there, although he agreed that he had known the plaintiff to travel in some such position on other occasions.

The driver of a dumper, a machine which received material from the quarry and carried it away (with a speed of 4½ to 5 miles an hour), with a load of stone followed the traxcavator a few seconds later round the stationary excavator, and then to the left to reach the roadway towards the canteen, and crashed into the back of the traxcavator, and the plaintiff was injured. The vehicles were not on a highway.

The driver of the dumper said in evidence that the plaintiff had asked him for a lift on his dumper, but that he had refused to take him and he said that he thought at the time that the plaintiff might well have taken a lift on the traxcavator.

The plaintiff sued the defendants, alleging negligence on the part of both drivers, but the allegation of negligence against the driver of the traxcavator was not pursued; the driver of the dumper, it was said, was guilty of negligence particularly in failing to keep a proper look-out. The defendants pleaded that the plaintiff caused or contributed to his injuries by his own negligence—particulars: "the plaintiff climbed on to and rode "upon the back of a traxcavator when he knew that such con- "duct was dangerous and was forbidden by his employers the "defendants."

Hallett J. found negligence on the part of the defendants' servant, the driver of the dumper, in failing to act as a reasonably careful driver and in particular in not keeping an adequate look-out. His Lordship found contributory negligence on the part of the plaintiff, in that he had placed himself in a position of danger on the traxcavator, and he found that the plaintiff was responsible to the extent of one-fifth of the total damage, which he assessed at £6,492, awarding him £5,193 12s. damages.

The plaintiff appealed on the ground (1) of the inadequacy of the damages (on which point the case is not reported) and (2) that the trial judge should not have found the plaintiff to blame, since he had not caused the injury.

The defendants cross-appealed on the grounds that the defendants owed no responsibility to the plaintiff since the plaintiff was on the traxcavator against orders and that, since the driver of the dumper had no reason to think that anyone might be placed where the plaintiff had placed himself, this sort of accident was not foreseeable. There was, therefore, they alleged, no negligence on the part of the driver of the dumper.

Arthian Davies Q.C. and *Norman Francis* for the plaintiff.
H. V. Lloyd-Jones Q.C. and *Wien* for the defendants.
The arguments sufficiently appear from the judgments.

SINGLETON L.J., having stated the relevant facts, continued:— I propose to consider first the submissions made by counsel for the defendants on the cross-appeal. Hallett J. in the course of his judgment used these words: "On the other hand, despite "strenuous efforts by Mr. Lloyd-Jones on his behalf, I feel no "doubt whatever that the dumper driver was negligent. I have "done my best to understand his point of view and explanations "and excuses, but I cannot construct any view of this accident "which is compatible with the dumper driver having driven in "a reasonable manner at all. I think it is clear on the evidence "in this case that he cannot have been keeping a good look-out "and driving with proper care and yet have run into the back of "the traxcavator. I do not think I am called upon to examine "the facts in detail . . . that is the view at which I have arrived." I find myself in complete agreement with the judge upon that part of the case. The dumper driver was in charge of a vehicle which could only move slowly. He said he took a very sharp left-hand turn round the excavator; the traxcavator was some little distance further on. I do not see for myself how the driver could have been keeping any sort of look-out when he went round almost a right-angle, and yet failed to see the traxcavator either before rounding the excavator or afterwards in time to stop. I have no doubt whatever in my mind that the driver of the dumper was guilty of negligence.

Mr. Lloyd-Jones submitted that there was no responsibility on the driver in the circumstances, because he was not to anticipate that there would be a man on the traxcavator, and, as he pointed out, this was not an accident which arose upon a highway. The evidence shows that there were a number of people who worked at the quarry face, all of whom except two could be expected to be on their way to lunch immediately after the whistle sounded, and it appears that sometimes the drivers of vehicles took a few of them down that way instead of walking. In those circumstances, it was the duty of the driver of the dumper to keep a proper look-out, and he owed it to every other person who worked there, and to any person who might reasonably be expected to be in a position by which he would pass, and that duty was owed to this plaintiff even though he was on the traxcavator. There are two answers given by the driver of the dumper himself which show that he might well have thought that the plaintiff would take a lift upon the traxcavator. He said that the plaintiff had asked him for a lift on the dumper; he refused, and he thought the plaintiff might quite well have taken a lift upon the traxcavator. It seems to me that the cross-appeal of the defendants based upon the submission that there was no negligence on the part of the driver of the dumper fails.

The matters raised by the appeal present more difficulty. I propose to deal now with the submission of Mr. Arthian Davies that the judge ought to have found that the accident was wholly due to the negligence of the defendants' driver, and that the plaintiff himself did not contribute to it. The way in which the case was put by Mr. Arthian Davies in opening the appeal was that the fact that the plaintiff was standing upon the traxcavator was not in any sense a cause which operated on the accident which befell him; in other words, he said the real cause of this accident to the plaintiff was the negligent driving of the driver of the dumper, and though the plaintiff, on the judge's finding, ought not to have been on the traxcavator, that had nothing to do with the accident which befell him. I confess there is something which I find intriguing in that submission. There were, in the course of the argument, a number of instances given: one was the case of someone who negligently and improperly sits upon an unsafe wall, and the driver of a motor-car not keeping a proper look-out runs into the wall and knocks it down; is the person sitting on the wall, who is injured, guilty of negligence which contributed to the accident? In those circumstances it might well be said he would not be, but every case depends upon its own facts. We have had a considerable argument addressed to us upon the judgments in this court in *Davies* v. *Swan Motor Co. (Swansea) Ld.*[1] That was a case in which a man had been killed, and his widow brought the action. The man had been standing on steps at the side of a dust lorry, standing, that is, in a dangerous place, and the lorry was travelling along a narrow road at a time at which a bus tried to pass the lorry, and the man was unfortunately killed. In that case this court held that the man Davies, who was killed, was himself one-fifth responsible for the damage because of his negligence in standing upon, or being upon, the side of the dust lorry. As I have said, facts in all cases differ, and I do not find very much help towards the decision in this case from the report of that. It is sufficient, I think, to read two passages from the judgment of Bucknill L.J. He said [2]: "In addition to that answer to the point made by "Mr. Glyn Jones, there is another answer, viz., that when one "is considering the question of contributory negligence, it is not "necessary to show that the negligence constituted a breach of "duty to the defendant. It is sufficient to show lack of reason-"able care by the plaintiff for his own safety. That is set out "clearly in the speech of Lord Atkin in *Caswell* v. *Powell Duffryn* "*Associated Collieries Ld.*,[3] as follows: 'But the injury may be "'the result of two causes operating at the same time, a breach "'of duty by the defendant and the omission on the part of the "'plaintiff to use the ordinary care for the protection of himself "'or his property that is used by the ordinary reasonable man in "'those circumstances. In that case the plaintiff cannot recover "'because the injury is partly caused by what is imputed to him "'as his own default. On the other hand, if the plaintiff were "'negligent, but his negligence was not a cause operating to "'produce the damage, there would be no defence.'" Those words of Lord Atkin were spoken before the Law Reform (Contributory Negligence) Act, 1945, came into force, and I think that they give some considerable help towards the solution of the question now before this court.

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[1] [1949] 2 K.B. 291.

In the other passage Bucknill L.J. said [4]: "I ask myself this "question in the ordinary plain common sense of this business: "Did the negligence of the deceased man in standing on the steps "of the lorry right up to the moment of the collision (or, at any "rate, until he tried to climb inside the lorry) contribute to his "injury? I think that what he did clearly contributed to his "injury." Bucknill L.J. there puts to himself what he describes as the ordinary plain common sense of this business. I believe that to be the test in all these cases. It was submitted to us that the prohibition against riding upon one of these vehicles was because of the danger of a man falling off, or the danger of his becoming trapped in some part of the machine. I think there is more than that to be considered. The plaintiff, in riding on the traxcavator, was disobeying the orders of his employers. In so doing he was exposing himself to danger. It may well be that the chief danger was that he might fall off, or be thrown off, or that he might become entangled in some part of the machine on which he was riding; but those were not the only risks to which he subjected himself. He had put himself in a dangerous position which, in fact, exposed him to the particular danger which came upon him. He ought not to have been there. The fact that he was in that particular position meant that he exposed himself, or some part of his body, to another risk, the risk that some driver following might not be able to pull up in time—it may be because that driver was certainly at fault. That is the view which the trial judge took of this case, and I do not see that that is a wrong view. It is not so much a question of Was the plaintiff's conduct the cause of the accident? as Did it contribute to the accident? on the assumption that it was something of a kind which a reasonably careful man so placed would not have done. If he unreasonably, or improperly, exposed himself to this particular risk, I do not think that he ought to be allowed to say that it was not a cause operating to produce the damage, even though one may think that the prohibition against riding on the vehicle was not made with that particular risk in mind. Hallett J. felt great difficulty about this part of the case. So do I. My first impression was that the fact that the plaintiff was upon the traxcavator had nothing to do with the accident. I think the real cause was the negligence of the driver of the dumper. The trial judge considered the relevant authorities, and in particular he considered what was said by this court in *Davies* v. *Swan Motor Co. (Swansea) Ld.*[5] I agree with him that the responsibility of the plaintiff for the accident was much less than that of the driver of the dumper. Still, when one has to consider the question of contributory negligence, I do not see that it can be said that the judge was wrong in finding that the plaintiff, who deliberately put himself into a position which exposed him to this danger, was to some extent responsible for that which happened; in other words, I do not think it would be right for this court on these findings to say that the judge was wrong in law; it is not argued before us that the proportion of liability ought to be altered if, in fact, there was contributory negligence on the part of the plaintiff. The submission, therefore, that the plaintiff ought not to have been found to blame at all fails.

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[2] [1949] 2 K.B. 291, 308.

[3] [1940] A.C. 152, 164.

[4] [1949] 2 K.B. 291, 313.

[His Lordship then considered the plaintiff's appeal on the

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[5] [1949] 2 K.B. 291.

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SAME.

ground that the full damages which he would have been awarded if he had not been guilty of contributory negligence—£6,492—were inadequate, and having held that the court could not properly interfere with the award, continued:] In my opinion the appeal on each ground, and the cross-appeal, should be dismissed.

DENNING L.J. The facts are simple. The plaintiff rode on the towbar of a vehicle, which was a careless thing to do because of the danger that he might fall off. Later, whilst the vehicle was almost stationary, another vehicle negligently ran into him from the back as he stood on the towbar, and he was crushed between the two vehicles. The question is whether he was guilty of contributory negligence such as to reduce his damages. The case of *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*[6] has been much discussed before us. It has been said that the three judgments in that case do not proceed on precisely the same lines. That is true, but it is, I suggest, quite understandable, because the court was there feeling its way in difficult country. Since that time, however, the ground has been cleared considerably. ① It can now be safely asserted that the doctrine of last opportunity is obsolete; ② and also that contributory negligence does not depend on the existence of a duty. But the troublesome problem of causation still remains to be solved.

✓ Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them? The necessity of causation is shown by the word "result" in section 1 (1) of the Act of 1945, and it was accepted by this court in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld.*[6]

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[6] [1949] 2 K.B. 291.

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Denning L.J.

There is no clear guidance to be found in the books about causation. All that can be said is that causes are different from the circumstances in which, or on which, they operate. The line between the two depends on the facts of each case. It is a matter of common sense more than anything else. In the present case, as the argument of Mr. Arthian Davies proceeded, it seemed to me that he sought to make foreseeability the decisive test of causation. He relied on the trial judge's statement that a man who rode on the towbar of the traxcavator "ran the risk of being "thrown off and no other risk." That is, I think, equivalent to saying that such a man could reasonably foresee that he might be thrown off the traxcavator, but not that he might be crushed between it and another vehicle.

In my opinion, however, foreseeability is not the decisive test of causation. It is often a relevant factor, but it is not decisive. Even though the plaintiff did not foresee the possibility of being crushed, nevertheless in the ordinary plain common sense of this business the injury suffered by the plaintiff was due in part to the fact that he chose to ride on the towbar to lunch instead of walking down on his feet. If he had been thrown off in the collision, Mr. Arthian Davies admits that his injury would be partly due to his own negligence in riding on the towbar; but he says that, because he was crushed, and not thrown off, his injury is in no way due to it. That is too fine a distinction for me. I cannot believe that that purely fortuitous circumstance can make all the difference to the case. As Scrutton L.J. said in *In re Polemis and Another and Furness, Withy & Co. Ld.*[8]: "Once the act is negligent, the fact that its exact operation was "not foreseen is immaterial."

In order to illustrate this question of causation, I may say that if the plaintiff, whilst he was riding on the towbar, had been hit in the eye by a shot from a negligent sportsman, I should have thought that the plaintiff's negligence would in no way be a cause of his injury. It would only be the circumstance in which the cause operated. It would only be part of the history. But I cannot say that in the present case. The man's negligence here was so much mixed up with his injury that it cannot be dismissed as mere history. His dangerous position on the vehicle was one of the causes of his damage just as it was in *Davies* v. *Swan Motor Co. (Swansea) Ld.*[9]

The present case is a good illustration of the practical effect

[8] [1921] 3 K.B. 560, 577.

[9] [1949] 2 K.B. 291.

of the Act of 1945. In the course of the argument my Lord suggested that before the Act of 1945 he would have regarded this case as one where the plaintiff should recover in full. That would be because the negligence of the dumper driver would then have been regarded as the predominant cause. Now, since the Act, we have regard to all the causes, and one of them undoubtedly was the plaintiff's negligence in riding on the towbar of the traxcavator. His share in the responsibility was not great—the trial judge assessed it at one-fifth—but, nevertheless, it was his share, and he must bear it himself.

We were referred by Mr. Arthian Davies to the Canadian case of *McLaughlin* v. *Long*.[10] In that case a boy riding on the running-board of a car was flung off when the car crashed owing to the driver's negligence. The boy recovered full damages without any reduction. The case seems to have proceeded on the ground that the boy was on the car with the tacit consent of the driver and was not guilty of contributory negligence. I confess that I do not follow this. If people choose to ride in a dangerous position, surely it is their own fault, even if the driver acquiesces in it. If the boy was guilty of contributory negligence, I should have thought it plain that his negligence was one of the causes of his injury, though the driver's negligence was, of course, the principal cause. The explanation of the decision may be that in 1926 the doctrine of last opportunity was still influential in Canada, as, indeed, it was here at that time. But it is so no longer, at any rate not here.

It all comes to this: If a man carelessly rides on a vehicle in a dangerous position, and subsequently there is a collision in which his injuries are made worse by reason of his position than they otherwise would have been, then his damage is partly the result of his own fault, and the damages recoverable by him fall to be reduced accordingly.

Hodson L.J., having dealt with the plaintiff's appeal on the total amount of damages, continued:—The plaintiff relies on a finding of the trial judge which he said, if correct, entitles him to succeed entirely and not to have his damages reduced by one-fifth, or any other proportion, which the judge or this court might assess, since the plaintiff was injured because of the negligent act of the driver of the dumper which ran into him from behind, when he was travelling on the back of this traxcavator. The plaintiff's case in this court was that the fact that he was exposing himself to a risk in travelling in a dangerous place in defiance of orders given to him by his employers was nihil ad rem; it had nothing to do with the cause of the accident, and he relied on the trial judge's finding: "This was a vehicle with tracks, not a vehicle "with wheels, and it seems to me that in doing that, any man "was running the risk, in travelling somewhere which was not "a proper place to travel, of being thrown off—that is, I think, "the risk which he ran, and no other."

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[10] [1927] S.C.R. 303.

If that is right, it was contended that it could not be said that this man travelling in that place and not having been thrown off was the cause of the accident any more than it would have been the cause of the accident if he had been shot by the negligent act of a man with a shotgun who was firing at a bird in the neighbourhood and hit him while he was travelling in this dangerous position. I think, however, that in spite of the sentence which I have quoted, the trial judge went beyond that finding in his conclusion, because whilst a witness, Mr. Ferriman, was being cross-examined, the judge made it clear that he had to consider not only whether the action of the plaintiff was in itself a dangerous action, but also whether it was a cause of the accident, and he reminded himself of the distinction between the causa sine qua non and the causa causans. Addressing Mr. Lloyd Jones, Hallett J. said: ". . . If you mean in the sense that "he was liable to fall off, I should have thought it was pretty "obvious. If you mean in the sense that he knew he was there "and exposing himself to being charged in the back by another "driver, it may be rather different." That, I think, is vital on the question in this case: Was this man, riding in the position in which he was, exposing himself to the risk of being run into in the back by the driver of another vehicle? These vehicles were proceeding, apparently, on a regular course in and about the quarries on the way to the mid-day meal. The following vehicle, which was driven by the driver who was found to be mainly to blame for the accident, was loaded with stone; the leading vehicle, the traxcavator, was a tracked vehicle which had to stop in order to change gear, and what happened here was that the following vehicle, a wheeled vehicle, ran into the back of the other, and the man who was travelling on the back of the leading vehicle was protruding to some extent from the back. The danger to which he was exposing himself was, in my judgment, not only the danger of falling off the vehicle, but also the danger of being injured in the way in which he was. I appreciate that this approach may lead to fine distinctions, but I think that is inevitable in considering almost any problem which one has to consider in these courts; there comes a time when the line is drawn very fine. Mr. Arthian Davies says that this conclusion ought not to be reached, partly, at any rate, because it is not open to the defendants on the pleadings, but I think it is so open. The relevant pleading is this: ". . . if the plaintiff "sustained the alleged or any injuries he caused or contributed "to the same by his own negligence. Particulars. The plain-"tiff climbed on to and rode upon the back of a traxcavator "when he knew that such conduct was dangerous and was "forbidden by his employers." I think that covers this way of putting the case, and that the prohibition was not limited to or given simply because of the danger of falling off the vehicle, but because of other dangers which were inherent in riding on these vehicles in the circumstances in which they were used. Further, I think some assistance is gained from *Davies* v. *Swan Motor Co. (Swansea) Ld.*,[11] a case which was very much discussed before the trial judge. It was there contended by counsel for the defendants, who was seeking to impose liability, in part at any rate, upon the deceased man Davies, that his position upon the step embarrassed, or might embarrass, the omnibus driver, and that the deceased man was acting in defiance of the orders and regulations made by the local authority. Bucknill L.J. referred to the regulations themselves and quoted them in full, regulations which showed that the authority regarded the practice of riding on the steps of dust lorries as a dangerous practice which could be the cause of injury to the man himself and to other users of the road. Bucknill L.J. said[12]: "By taking up that "position he, to some extent, increased the width of the lorry, "thereby making the passageway less broad. It is also one "thing for a vehicle to pass another vehicle with wooden or iron "sides, and another thing to pass another vehicle with wooden "or iron steps attached to its sides and a living human body "standing on those steps. The operation of passing is more "difficult in the latter circumstances."

I appreciate that one must not press too far the analogy between road traffic cases and cases where accidents occur in quarries or places of work, where different circumstances arise; but here I think the finding of the judge was right in that he decided that to a limited extent (the proportion arrived at being one-fifth) the plaintiff did contribute to the injury which he suffered, and that the language of the Law Reform (Contributory Negligence) Act, 1945, s. 1, and the definition of "fault" in section 4, which I will not re-read, apply. I think, therefore, that the plaintiff's appeal fails. So far as the cross-appeal is concerned, I agree with the judge's finding entirely, and I have nothing to add. That also fails.

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[11] [1949] 2 K.B. 291.

[12] Ibid. 307.

Appeal and cross-appeal dismissed.

Solicitors: *Kinch & Richardson, for Allen Pratt & Geldard, Cardiff; Botterell & Roche, for T. S. Edwards & Son, Newport, Mon.*

C. G. M.

1952
April 24.

Lord Goddard C.J., Oliver and Byrne JJ.

BLENKIN *v.* BELL.

Road traffic—Motor car—Shooting brake—Goods vehicle licensed under "C" licence—Vehicle "authorized to be used under a licence "granted under Part I of the Road and Rail Traffic Act, 1933*"—Vehicle used solely for the carriage of passengers—Speed limit—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch. I—Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *Sch. I—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 8, 9*—Motor Vehicles (Variation of Speed Limits) Regulations,* 1950 (*S.I.* 1950, *No.* 1705), *r.* 2.

Regulation 2 of the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, which varies Sch. I to the Road Traffic Act, 1930, as amended, and imposes a speed limit on goods vehicles, applies to motor cars which are authorized to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933, but, by section 9 (2) of that Act, "Notwithstanding that a "vehicle is an authorized vehicle, the conditions of the licence shall "not apply while the vehicle is being used for any purpose for "which it might lawfully be used without the authority of a "licence."

Where, therefore, a shooting brake which is licensed under Part I of the Road and Rail Traffic Act, 1933, and which complies with the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, in other respects, is being used solely for the carriage of passengers and not for the carriage of goods, it is not subject to the speed limit imposed on vehicles of that class and description by Sch. I to the Road Traffic Act, 1930, as amended.

CASE STATED by Durham justices sitting at Durham.

An information was laid by the appellant, a superintendent of police, against the respondent, William James Bell, alleging that, on August 28, 1951, he " . . . being the driver of a motor-" vehicle . . . unlawfully did drive . . . at a speed greater than " 30 miles an hour, the speed specified in the First Schedule to " the Road Traffic Act, 1934, as the maximum speed in relation " to a vehicle of that class or description, contrary to section 10 " of the Road Traffic Act, 1930. . . ."[1]

At the hearing of the information the following facts were proved or admitted: On August 28, 1951, the respondent was driving a Lea Francis shooting brake on a de-restricted road when the speed of his vehicle was checked at four speeds in excess of 30 miles an hour. The respondent owned the vehicle and had been granted a goods carrier's " C " licence under Part I of the Road and Rail Traffic Act, 1933. The vehicle consisted of a wooden body with side windows along its whole length and had two doors for the use of the front, and two for the use of the rear, passengers; there was also a door at the back. It had a seat for one passenger beside the driver and two rear seats for passengers; the two rear seats were fixed to the floor by screws and bolts which had to be removed in order to remove the seats. The vehicle was equipped with pneumatic tyres and weighed less than three tons. The respondent sometimes used the vehicle for carrying goods, namely books, when he would remove the rear seats for that purpose, but on the occasion in question he was using the vehicle solely for the carriage of passengers and was not carrying any goods, and the rear seats were in their fixed position.

On behalf of the prosecution it was contended that, as a goods vehicle licensed under a " C " licence, the vehicle was subject to a speed limit of 30 m.p.h. as laid down in Sch. I to the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934, from which it was not exempted by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950. On the part of the respondent it was contended that, having regard to its construction, the vehicle was not a goods vehicle but a passenger vehicle; that it was not subject to the speed limit merely by virtue of being licensed under

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[1] Road Traffic Act, 1930, s. 10 (1): " It shall not be lawful for any person " to drive a motor vehicle of any class " or description on a road at a speed " greater than the speed specified in " the First Schedule to this Act as the " maximum speed in relation to a " vehicle of that class or description, " . . ."

Part I of the Road and Rail Traffic Act, 1933; and that, unless it was a goods vehicle, the regulation and speed limit did not apply, notwithstanding the licensing of the vehicle under the Road and Rail Traffic Act, 1933. The justices, being of the opinion that, as the vehicle was not being used under the authority of a "C" licence issued under Part I of the Road and Rail Traffic Act, 1933, at the material time but as a private car carrying passengers, it was not subject to the 30 m.p.h. speed limit, dismissed the information.

The prosecutor appealed.

D. H. Robson for the prosecutor. Before the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, came into force the speed of goods vehicles was limited by Sch. I to the Road Traffic Act, 1934,[2] substituted for Sch. I to the Road Traffic Act, 1930. In *Hubbard* v. *Messenger*[3] it was held that a Ford Utility car constructed to carry passengers but also to carry goods was a goods vehicle subject to the speed limit whether seats were fitted in it or not. The Regulations of 1950 were passed to relieve that situation, and by substituting paragraph 2 (*a*)[4] for paragraph 2 (1) (*a*) of the schedule provided that only a goods vehicle which was authorized to be used under Part I of the Road and Rail Traffic Act, 1933, need conform to the speed limit. It is submitted that the vehicle in the present case, which has been licensed with a "C" licence and is therefore authorized to be used under Part I of the Act of 1933, even though not necessarily so used, is subject to the speed limit.

Norman Skelhorn for the respondent. The effect of the regulations is that a goods vehicle licensed with a "C" licence and which complies with the regulations in other respects need not necessarily be used under the authority of that licence and, if not so used, need not conform to the speed limit.

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[2] S. 2 of the Road Traffic Act, 1934, substitutes the First Schedule to that Act for the First Schedule to the Road Traffic Act, 1930. The First Schedule to the Road Traffic Act, 1934, provides that the maximum speed shall be for "2. *Goods vehicles*, that is to say, "vehicles constructed or adapted for "use for the conveyance of goods or "burden of any description:—(1) . . . "(*a*) Motor cars and motor cycles . . . "30" miles per hour.

[3] [1938] 1 K.B. 300.

[4] Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I. 1950, No. 1705): "2. The provisions "of the First Schedule to the Act" [the Road Traffic Act, 1930] "as "substituted by the Road Traffic Act, "1934, and as varied by . . . Regula- "tions . . . shall be further varied "and have effect as though in sub- "paragraph (1) of paragraph 2 . . . "there were substituted for sub- "division (*a*) the following sub-divi- "sions:—(*a*) motor-cars . . . which "are authorized to be used under a "licence granted under Part I of the "Road and Rail Traffic Act, 1933, ". . . 30."

In construing the regulations it is necessary to look at the Road and Rail Traffic Act, 1933, in particular at sections 8 and 9 (2). Section 8[5] makes it a condition of every licence that any provisions with regard to speed limits must be complied with in relation to the authorized vehicles, but by section 9 (2): "Notwithstanding that a vehicle is an authorized vehicle, the "conditions of the licence shall not apply while the vehicle is "being used for any purpose for which it might lawfully be used "without the authority of a licence." It is submitted, therefore, that the words in the regulation ". . . which are authorized to "be used under a licence granted under Part I of the Road and "Rail Traffic Act, 1933" must be construed as meaning "used "in a manner requiring the authority of a licence . . ."; any other construction would cause a conflict between the Act of 1933 and the regulations and would also give rise to the anomaly that if a vehicle which was required by law to have a "C" licence did not have such a licence it would not be subject to the speed limit.

The vehicle in question was not being used in a manner requiring the authority of a "C" licence, but was being used as a passenger-carrying vehicle only, and it is submitted that at the material times it was not subject to the speed limit.

The vehicle in *Hubbard* v. *Messenger*[6] plainly was a goods vehicle and was of a different construction from the one in question. The respondent's vehicle was originally constructed as a passenger vehicle, and in order to convert it into a goods vehicle it was necessary to remove the seats by unscrewing bolts. That amounts to an adaptation of structure and it is submitted that in each case it is the construction of the particular vehicle which must be looked at and that *Hubbard* v. *Messenger*[6] can be distinguished.

D. H. Robson in reply. The substituted schedule to the Road Traffic Act, 1930, makes all goods vehicles subject to a speed limit; the schedule does not make any mention of passenger vehicles. The regulations of 1950 vary the first paragraph of the schedule relating to goods vehicles, but the only effect of the variation is to exclude from the schedule certain small vehicles which could be used for goods. To determine what is to be excluded the regulation itself, and nothing else, must be looked at; it defines by reference to the Road and Rail Traffic Act, 1933, a class of vehicles which are not to exceed 30 miles an hour.

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[5] Road and Rail Traffic Act, 1933, s. 8 (1): "It shall be a condition of "every licence—(*b*) that any provi"sions . . . with respect to limits of "speed . . . of goods vehicles, are "complied with in relation to the "authorized vehicles."

[6] [1938] 1 K.B. 300.

The Act of 1933 makes obedience to speed limits a condition of the grant of carriers' licences; section 9 (2) is concerned with the conditions imposed in respect of licences granted under that Act, but, apart from the Act of 1933, the general law is that a goods vehicle must conform to the speed limits laid down for vehicles of its class. The 1950 Regulations refer to the 1933 Act for the purpose of defining vehicles only; had it been desired to allow certain goods vehicles to go at any speed nothing would have been easier than for the regulation to have been worded to say so explicitly. That was not done, and it is submitted that there is nothing in the regulation to exempt the respondent's vehicle from the speed limit.

It cannot be said that the vehicle in question is not a goods vehicle; if it was not, it is submitted that the requirement for a carrier's licence would not arise. [*Hubbard* v. *Messenger*[6] referred to.]

LORD GODDARD C.J. The real point that falls for decision is whether the car in this case was to be regarded for the present purpose as a goods vehicle. The car, as found by the justices, was one of those vehicles which are known as shooting brakes or utility vans. The court is very familiar with that class of vehicle, and has been ever since *Hubbard* v. *Messenger*.[6] They are now very common objects on the roads, and although Mr. Skelhorn has said that he has a point that this case is to be distinguished, so far as the make and construction of the vehicle is concerned, from *Hubbard* v. *Messenger*,[6] the court is giving its decision on the footing that this utility truck was of the same class and description as the vehicle in *Hubbard* v. *Messenger*.[6] We are doing that without prejudice to Mr. Skelhorn's point that he can distinguish the cases; in other words, we are going to decide this case on the ground that this vehicle could be described, at any rate when it was carrying goods, as a goods vehicle and not as a passenger vehicle—which means a vehicle constructed solely for the carriage of passengers and their effects.

It is necessary, in order to appreciate the issue, to refer briefly to one or two provisions. The Road Traffic Act, 1930, which removed a speed limit for passenger vehicles, provided they were passenger vehicles not carrying more than seven people—so that it did not apply to omnibuses, a fact which it is desirable that omnibus drivers should remember—provided, by Sch. I (2), a 30-mile-an-hour speed limit for goods vehicles, defined as follows: "*Goods vehicles*, that is to say vehicles constructed or adapted "for use for the conveyance of goods or burden of any description:—(1) When not drawing a trailer—(*a*) Motor cars, if all "the wheels are fitted with pneumatic tyres; and (*b*) Heavy "motor cars, constructed or adapted for the conveyance of horses "and their attendants and used solely for that purpose, if all the "wheels are fitted with pneumatic tyres."

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[6] [1938] 1 K.B. 300.

The Road and Rail Traffic Act, 1933, set up a system of licensing for goods vehicles, and provided by section 2 for various forms of licences known as public carriers' licences, limited carriers' licences and private carriers' licences, some one of which had to be taken out to enable a goods vehicle to operate on the road; a private carriers' licence is referred to in section 2 (4) as a "C" licence.

The vehicle with which we are concerned was one which had a "C" licence, and by section 8 (1) of the Act of 1933: "It "shall be a condition of every licence . . . (*b*) that any provisions "(whether contained in any statute or in any statutory rules or "orders) with respect to limits of speed and weight, laden and "unladen, and the loading of goods vehicles, are complied with "in relation to the authorized vehicles. . . ." Observe the use of the words "authorized vehicles" there. Under section 8 it is clear that every licence which is granted in respect of a goods vehicle under the provisions of this Act—including every "C" licence—contains, or must be deemed to contain, a provision that the vehicle must not be driven on the roads at more than 30 miles an hour.

Then, by section 9 (2): "Notwithstanding that a vehicle is "an authorized vehicle"—that is to say, a vehicle with a licence —"the conditions of the licence shall not apply while the vehicle "is being used for any purpose for which it might lawfully be "used without the authority of a licence." The effect of that seems to me to be clear. Although a vehicle with a "C" licence must be deemed to have a condition attached to it that it shall only be driven at 30 miles an hour, if it is not being used as a goods vehicle then the condition shall not apply while it is being used for any purpose for which it might lawfully be used without the authority of such a licence; in other words, it could be used as a passenger-carrying vehicle, and if it is being used only as a passenger-carrying vehicle and not as a goods vehicle no licence is required, and the conditions of the licence will not apply.

The Road Traffic Act, 1934, Sch. I, para. 2, defines goods vehicles as follows: "Vehicles constructed or adapted for use "for the conveyance of goods or burden of any description:— "(1) When not drawing a trailer—(*a*) Motor cars and motor "cycles, if the first condition as to tyres is satisfied; and motor "cars not exceeding one ton in weight unladen and motor cycles, "if the second condition as to tyres is satisfied." I need not go into the question of tyres. Goods vehicles so defined may only be driven at 30 miles an hour.

Then, no doubt owing to the fact that there had been many prosecutions and a certain amount of dissatisfaction with regard to the use of these shooting brakes, a regulation was made by the Minister known as the Motor Vehicles (Variation of Speed Limit) Regulations, 1950. The effect of the regulation was to substitute an amended provision for the provision under paragraph 2 of Sch. I to the Act of 1934, which I have just read, so that that schedule must be read in this way: "Goods vehicles, that is to "say, vehicles constructed or adapted for use for the conveyance "of goods or burden of any description:—(1) When not drawing "a trailer—(*a*) motor cars and motor cycles in the case of which "the first condition as to tyres is satisfied and which are "authorized to be used under a licence granted under Part I of "the Road and Rail Traffic Act, 1933." Therefore, if a vehicle comes within the provisions of this regulation it must only be driven at 30 miles an hour, but it applies to motor cars which are authorized to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933; and when one goes back to the Road and Rail Traffic Act, 1933, one finds that by section 9 (2) it is provided that: "Notwithstanding that a vehicle is an "authorized vehicle, the conditions of the licence shall not apply "while the vehicle is being used for any purpose for which it "might lawfully be used without the authority of a licence."

In other words, it is to be treated as though it was not licensed under Part I of the Act of 1933. That, I think, is really the answer. Section 9 (2) of the Act of 1933 provides that if the vehicle is not being used for the purpose of carrying goods or burden, it is not to be subject to the conditions to which the section would otherwise subject it. I can find no indication that the Act of 1934 is intended to repeal or alter section 8 or section 9 of the Act of 1933, and it seems to me that it is a satisfying and satisfactory conclusion because it is consonant with reason and common sense. One has a vehicle which can be used either for carrying passengers or goods or both. If it is being used for carrying goods as distinct from passengers' luggage it requires a certain licence and certain restrictions are placed on it as long as it is being used as a goods vehicle. If it is not being used as a goods vehicle it would not require that licence; it would only require the licence while carrying goods, and the speed limit is only applicable when it is carrying goods. In *Hubbard* v. *Messenger*[6] the point did not arise because there the vehicle was carrying goods and was restricted to 30 miles an hour.

In the present case, the justices have found that this vehicle was not being used for carrying goods, and, in my opinion, they came to a right decision and, indeed, are to be congratulated on the manner in which they found their way through this tangle of regulations and Acts. In my opinion this appeal fails and must be dismissed.

OLIVER J. I agree.

BYRNE J. I agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards, for Swinburne & Jackson, Durham; A. J. A. Hanhart, for Hadaway & Hadaway, Newcastle-on-Tyne.*

J. F. L.

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[6] [1938] 1 K.B. 300.

HEWITT *v.* HEWITT.

1952
May 23;
June 10.

Lord Goddard C.J., Devlin and Gorman JJ.

Husband and Wife—Maintenance order—Spouses both resident in same house—Husband's subsequent absence from and return to residence—No resumption of cohabitation—Order enforceable—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 *and* 16 *Geo.* 6, *c.* 51), *ss.* 1 (4), 2 (2).

Where, less than three months after a maintenance order is made against him, a husband leaves the house in which he and his wife were residing and later returns to reside under the same roof as his wife, the order remains effective indefinitely provided that there is no resumption of cohabitation: for the effect of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (which contemplates only one period of residence—namely the initial one following the making of the order) is that the order becomes enforceable on the husband's ceasing to reside with the wife; and once having become effective it remains so until there occurs the resumption of cohabitation contemplated by section 2 (2).

Evans v. *Evans* [1948] 1 K.B. 175, and *Thomas* v. *Thomas* [1948] 2 K.B. 294 considered.

CASE STATED by Warwickshire justices.

At a court of summary jurisdiction sitting at Coventry Elsie Mabel Hewitt made a complaint under the Summary Jurisdiction (Married Women) Act, 1895, against her husband, Richard Henry Hewitt, that certain payments of £3 10s. a week payable to her under a maintenance order made on May 26, 1950, and varied on November 17, 1950, had not been made and that there was in arrear the sum of £15.

At the hearing of the complaint the following facts were proved or admitted. On May 26, 1950, by virtue of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the wife obtained a maintenance order against her husband on the ground of his wilful neglect to maintain her and their infant children. The order provided for the payment of £3 weekly by the husband; and on November 17, 1950, the amount payable was increased to £3 10s. weekly. On May 26, 1950, husband and wife were residing at 113 Meadow Road, Nunts Park, Exhall, a house which some time before 1950 had been bought by the husband and wife as joint owners. After the making of the order on May 26, 1950, husband and wife had each separately paid their respective shares of certain payments due to a building society in respect of a mortgage on their house; and they each continued to live in the house until June 1950. The husband in June, 1950, left the house at 113 Meadow Road and lived in Coventry until October, 1950, when he resumed residence at 113 Meadow Road, and continued to reside there until the date of the hearing. The wife had resided continuously at 113 Meadow Road since the making of the order.

Whenever the husband was residing in the house after the making of the order the parties occupied separate rooms and the wife performed no domestic duties at all for the husband. The parties had not cohabited since the order was made. The sum of £15 was owing by the husband under the orders at the date of the complaint, and the whole of it had accrued in respect of a period during which both husband and wife had resided at 113 Meadow Road. The husband's refusal to pay the sum was due to his wilful default or culpable neglect.

It was contended for the husband that the maintenance order of May 26, 1950, as varied, was not enforceable for the period during which the sum of £15 had accrued, since for the whole of that period the wife had resided with the husband, and accordingly, by virtue of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925,[1] no liability accrued under the order whilst the wife resided with her husband.

It was contended for the wife that she was not residing with the husband; and, alternatively, that (1) since the wife had resided apart from the husband between June and October, 1950, the order could cease to have effect only if there were to be a resumption of cohabitation and could not cease to have effect merely by reason of the parties' residence together for a period of three months; (2) section 1 (4) of the Act of 1925 only applied to cases in which a married woman resided and continued to reside with her husband for three months immediately following the making of an order under the Act of 1895 as amended; (3) accordingly, the case was not affected by the provisions of section 1 (4) of the Act of 1925, but fell within section 2 (2) of the Act, and that by that section if the order did not cease to have effect through resumption of cohabitation it remained enforceable notwithstanding the fact that the parties had resumed residence under the same roof.

The justices were of the opinion that the wife was not residing with the husband and that the case was distinguishable from *Evans* v. *Evans*.[2] They considered that the facts differed from those in *Evans* v. *Evans* [2] in certain respects, of which one was that the house did not belong to the husband but was jointly owned by the parties. They ordered the husband to pay the sum of £15 or in default to go to prison for 31 days.

The husband appealed.

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[1] Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4): "No order made under the "principal Act shall be enforceable "and no liability shall accrue under "any such order whilst the married "woman with respect to whom the "order was made resides with her "husband, and any such order shall "cease to have effect if for a period of "three months after it is made the "married woman continues to reside "with her husband."

S. 2 (2): "Where a married woman "with respect to whom an order has "been made . . . resumes cohabita-"tion with her husband after living "apart from him . . . the order shall "cease to have effect on the resump-"tion of such cohabitation. . . ."

[2] [1948] 1 K.B. 175.

A. M. Wallace for the husband. The payments in question are all in respect of the period after the husband returned and the parties were residing under the same roof and the wife is consequently not entitled to enforce the order. The facts which the justices found are indistinguishable from those in *Evans* v. *Evans*,[2] which, it is submitted, governs this case. *Thomas* v. *Thomas*[3] was the other side of the dividing line, and was a case where the order was made while the parties were living apart. *Evans* v. *Evans*[4] was approved by this court in *Wheatley* v. *Wheatley*[5] and applied in *Harris* v. *Harris*.[6] In *Harris* v. *Harris*[6] the tenancy was in the joint names of husband and wife, but the court made no distinction on account of that fact. The fact that here the house is jointly owned is not material. The only difference between the facts here and those in *Evans* v. *Evans*[7] is that in the latter case there was no withdrawal from residence by either husband or wife at any time, whereas here the husband left the house within three months from the making of the order and returned some months later. The basis of the decision in *Evans* v. *Evans*[7] and the later cases is that the words "resides with" must be construed as "resides in the same "house as."

Section 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, must be looked at in the light of the Act of 1895, under which a married woman could only obtain an order if she was living apart from her husband and the order could be terminated on the husband's application on proof that there had been a resumption of cohabitation. The Act of 1925 amended and simplified the procedure with regard to such matters, and section 2 (2) restated the law about the effect of a resumption of cohabitation. Section 1 (4) of the Act of 1925 is the one here in point, and the first part of the section states clearly that no order shall be enforceable whilst the married woman resides with her husband.

Norman King and *Aubrey-Fletcher* for the wife. The maintenance order is still effective as there has been no resumption of cohabitation to terminate it. A wife is entitled to be supported by her husband, and if he fails to do so she is entitled to obtain an order against him and to enforce it so long as she does not commit a matrimonial offence such as adultery. Once she has obtained an order there are only two ways in which she can be deprived of its effects: (1) it ceases to have effect if the wife continues to reside with her husband for more than three months after the order was made—that has no application here as the husband left the joint house within the three months; and (2) by virtue of section 2 (2) of the Act of 1925 an order which has become effective ceases to be so if there is a resumption of cohabitation—which again was not the case here. In other words, once a maintenance order becomes effective, section 1 (4) has spent its force and the question of whether an order has been terminated depends on section 2 (2); but that section has no application here because the wife has merely stayed in her house, where she had a perfect right to be. In *Thomas* v. *Thomas* [8] this court pointed out that the period of residence contemplated by section 1 (4) was that immediately following the making of the order.

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[2] [1948] 1 K.B. 175.
[3] [1948] 2 K.B. 294.
[4] [1948] 1 K.B. 175.
[5] [1950] 1 K.B. 39.
[6] [1952] W.N. 83.
[7] [1948] 1 K.B. 175.

Cur. adv. vult.

June 10. LORD GODDARD C.J. [after stating the facts]:—The justices were of opinion that the case was distinguishable from *Evans* v. *Evans*,[9] and that they were justified in making the order complained of following the decision of *Thomas* v. *Thomas*.[10] I need not set out the sections of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, in extenso. Suffice it to say that under section 1 (1) a wife was given the right to apply for an order of maintenance on the grounds mentioned in the section although she had not at the time of making the complaint left her husband, and section 1 (4) provided that the order should not be enforceable and no liability should accrue under it while the married woman resided with her husband, and that the order should cease to have effect if for a period of three months after it was made the married woman continued to reside with her husband. Section 2 (2) provided that where a married woman resumed cohabitation with her husband after living apart from him the order should cease to have effect on the resumption of such cohabitation.

In *Evans* v. *Evans* [11] this court decided that "resides with" means "living in the same house with," and that judgment was reaffirmed by this court in *Wheatley* v. *Wheatley*.[12] But in *Thomas* v. *Thomas* [13] the court distinguished *Evans* v. *Evans* [14] and held that where the parties were living apart when the order was made and afterwards came to live in the same house the provisions of section 2 (2) applied, and that the order which had become effective was not ended unless cohabitation was resumed. In giving judgment in that case, and having regard to the facts there found, I said[15]: "The words of the Act seem to me to "show clearly that once the parties are living apart when the "order is made, what will put an end to that order is not resi"dence but cohabitation. . . . When the judgments in *Evans* "v. *Evans*[16] are read carefully it will be seen that the court "visualized the very case which has arisen here, and we pointed "out the difference between the residence which was sufficient "to prevent the order taking effect under section 1 and the "resumption of cohabitation which was required to put an end "to an order which had taken effect when the parties were living "apart."

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[8] [1948] 2 K.B. 294.
[9] [1948] 1 K.B. 175.
[10] [1948] 2 K.B. 294.
[11] [1948] 1 K.B. 175.
[12] [1950] 1 K.B. 39.
[13] [1948] 2 K.B. 294.
[14] [1948] 1 K.B. 175.

In *Thomas* v. *Thomas*[17] the parties came to live in the same house under an arrangement whereby the wife was admitted to the house as a tenant, or at any rate as something in the nature of a tenant and under an agreement which had been sanctioned by the justices whereby the husband was allowed to diminish the payment which they had ordered by a sum of 10s. a week which the wife had agreed to pay as rent for the rooms she occupied.

It is argued in this case that, as there was no such arrangement as there was in *Thomas* v. *Thomas*,[17] the decision in *Evans* v. *Evans*[18] applies and that *Thomas* v. *Thomas*[19] depended entirely upon the fact that the parties were living apart when the order was made; but in my opinion that is not the true distinction. Section 1 (4) appears to me clearly to visualize the case of an order being made while the parties are living together and to provide that so long as they continue to live together the order is not to take effect, and if that state of affairs lasts for three months the order ceases to have effect. In other words, the parties are given that period in which to make arrangements for living apart. Once they part the order becomes effective, and if the order does become effective it must remain in force unless the state of affairs visualized by section 2 (2)—namely, the resumption of cohabitation—takes effect or unless the justices put an end to the order, as they can do on the application of a

[15] [1948] 2 K.B. 299.

[16] [1948] 1 K.B. 175.

[17] [1948] 2 K.B. 294.

[18] [1948] 1 K.B. 175.

[19] [1948] 2 K.B. 294.

husband, if, for instance, the wife commits adultery, as provided by section 7 of the principal Act, the Summary Jurisdiction (Married Women) Act, 1895.

In my opinion the order of the justices came into force as soon as the husband left the house in June, 1950, and as there has never been a resumption of cohabitation the order still remains in force. I regard section 1 (4) as concerned with the period following the making of the order. The order never becomes effective while the residence existing at the time when the order was made continues, and if that state of affairs lasts for three months the order comes to an end. But once the order has become effective, as it does when the spouses separate, it requires a resumption of cohabitation or an order of the justices to put an end to it.

I desire, however, to reserve my opinion concerning what the position would be if a wife left her husband's house before the three months had elapsed and then returned in circumstances showing that there was not a genuine break in the residence but merely one for the purpose of endeavouring to make the order effective. This court has already pointed out that the difficulties which arise with regard to these matters is very largely due to the present shortage of houses, which often makes it very difficult for the spouses to find separate accommodation: a state of affairs which did not exist when the Act was passed. It is not a satisfactory state of affairs, and the position which arises under the Act of 1925 is eminently one which might be considered by the Royal Commission on Divorce which is now sitting, with a view to the attention of the legislature being called to the difficulties which arise.

In my opinion the justices came to a correct decision in this case and, as we intimated at the conclusion of the argument, the appeal is dismissed.

DEVLIN J. The presumed object of section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, has been several times stated by this court and cannot be in doubt. Parliament intended to relieve a wife of the necessity of having to leave home without knowing what support she could count on. It followed that she must be given a reasonable time (which Parliament considered to be three months) after she obtained her order within which to arrange for another dwelling. The corollary to that was that she should not enforce her order until she left home; otherwise she might get the benefit both of the joint establishment and of the means to maintain another one. I should not myself doubt, even without the authority of *Evans* v. *Evans*,[20] that in the provision that the order should not be enforced while the wife " resides with " the husband, the choice of a wider expression than " cohabit " was deliberate. It was not intended that the wife should obtain the benefit of the order merely by ceasing to live with her husband as his wife; she must forgo the order for so long as she stayed under his roof.

Parliament is gifted with no greater prevision than the ordinary man. It could not, in 1925, foresee the time when it would be quite common for an injured wife to continue to live permanently in her husband's house for the simple reason that she had nowhere else to go, and when the separated parties would make two dwelling-places out of the same structure. That was the situation which confronted this court for the first time in *Evans* v. *Evans*,[20] and has been before the justices in varying forms ever since. In such a situation this court is not free, as Parliament would be, to make such provision as is best fitted to the changed circumstances: it has to apply the language of the Act. This court therefore found itself compelled to hold that, notwithstanding the change in conditions, the wife was residing with her husband within the meaning of the Act. It might have taken the same view as Denning L.J. did in *Hopes* v. *Hopes*,[21] that while there was residence at the husband's house it was not residence *with* him. But it did not: and *Evans* v. *Evans*,[22] affirmed by this court in *Wheatley* v. *Wheatley*,[23] is the basis so far as any other Divisional Court is concerned for the construction of section 1 (4).

We are now faced with a case in which the wife, if she does not reside in the same house as her husband, will not only have to find somewhere else to live but may lose to some extent the benefit of her joint ownership of the matrimonial home. As in *Evans* v. *Evans*,[24] we are free to do justice only through the channel of an Act of Parliament; if the Act unexpectedly creates injustice, it is for Parliament to remove it and not for us. It is this consideration, and this only, which has caused me to hesitate a little before agreeing with the solution propounded by Lord Goddard C.J. When section 1 (4) is dealing with the enforceability of the order, it uses the word " resides "; when it is dealing with the cessation of the order, it uses the words " continues to

[20] [1948] 1 K.B. 175.

[21] [1949] P. 227, 236.

[22] [1948] 1 K.B. 175.

[23] [1950] 1 K.B. 39.

[24] [1948] 1 K.B. 175.

"reside." It may seem at first sight an unwarranted modification of section 1 (4) to read it as if it said "continues to reside" in both places. Given its literal meaning, it may be argued, section 1 (4) fits in happily with section 2 (2) to produce a piece of intelligible and workable machinery. So construed together, the sections provide for suspension of the order during residence at any time, and for its destruction in two events—resumption of cohabitation and extension of residence for three months after the making of the order.

But this, I think, is a superficial interpretation which makes sense of the words and almost nonsense of the enactment. It is clear in the first place that the period of three months' residence must be immediately after the making of the order. Lord Goddard C.J. so said in *Thomas* v. *Thomas*.[25] The word "continues" points inevitably to that conclusion, and presupposes the wife to be in residence at the time of the order. One could understand Parliament thinking that while residence simpliciter should merely suspend, residence for a continuous period should destroy. But I can think of no reason for attributing different results to the same length of residence according to whether it occurred initially or at some subsequent time. Why should three months initially destroy, and three months later (or, indeed, six or 12 months or indefinite residence later) merely suspend? The only sensible answer, I think, is that the section does not contemplate different periods of residence; it contemplates only one period, and that is the initial one. That fits in perfectly with the presumed object of the section as I have stated it above; there is, indeed, no meaning in any period of three months except as a period of transition after making the order. The change in phraseology from "resides" to "continues to "reside" would not appear significant to someone who never thought of the residence as being other than continuous. That was the position in 1925. No one would then have contemplated the likelihood of a wife, who had obtained her order and had ceased to reside with her husband, returning to his home without also resuming cohabitation.

There is nothing in this reasoning which clashes with the reasoning in *Evans* v. *Evans*.[26] The nature of the residence referred to in section 1 (4) is one thing and is defined by *Evans* v. *Evans*[26]; the period of residence covered by the section is another thing—whatever view is taken of the nature of the residence does not affect the period. But it must be recognized, I think, that this decision and *Evans* v. *Evans* [26] do not between them make of section 1 (4) a coherent and logical piece of legislation. The ill-advised wife who lets the three months run out will lose her order; the wife who leaves her husband's roof for long enough to break the residence may return and keep her order. Thus *Evans* v. *Evans* [26] may be a trap for the unwary. I think the decision in that case is best regarded as an outgrowth from certain words of the Act rather than as a manifestation of the meaning of the Act as a whole. Since Parliament alone can amend its words, the decision must stand until Parliament finds time to review it. But until that happens it can stand by itself.

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[25] [1948] 2 K.B. 299.

[26] [1948] 1 K.B. 175.

On the facts of this case it is not disputed that the residence was broken by the husband's departure and that the initial period of residence was under three months. It is therefore unnecessary to consider what acts are sufficient to break the period of residence. The residence that satisfies the test in *Evans* v. *Evans* [26] can be purely physical and can exist although the wish and intention of the parties is to live as far as possible apart. It may be that a physical change of residence, however short, and even if accompanied by an intention to resume the old residence at a later date, is enough to break the period. On this point I reserve my opinion.

I agree that the decision of the justices should be upheld. I must add, in deference to one of the points stated in their opinion, that I cannot regard the joint ownership of the house as a ground for distinguishing *Evans* v. *Evans*.[26] It seems to me to strengthen rather than weaken the case of residence with the husband.

GORMAN J. I agree that the decision of the justices must be upheld. I, too, am clearly of the opinion that section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, visualizes that the period of three months' residence must be that period after the making of the order, and that the order ceases to have effect if the parties continue to reside together beyond such period of three months.

In this case the parties ceased to reside together by reason of the husband's departure before the expiry of the period of three months after the making of the order, and nothing has subsequently happened to put an end to the order.

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[26] [1948] 1 K.B. 175.

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v.
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Gorman J.

I desire, too, to reserve my opinion as to what would be the legal effect if the break in the "residence" by one spouse within the before-mentioned period of three months was merely for the purpose of bringing the order into effect, and not a genuine break in the residence.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate, for Varley Hibbs & Co., Coventry; Julius White & Bywaters, for Penman, Johnson & Ewins, Coventry.*

S. C.

REGINA *v.* CHURCHILL.

C. C. A.

1952
June 16.

Lord Goddard C.J., Slade and Parker JJ.

Criminal Law—Sentence—Preventive detention—Length of sentence—Imprisonment.

The object of preventive detention is to protect the public from men and women who have shown by their previous history that they are a menace to society while they are at large. In view of the remission which can be earned a sentence of less than eight years' preventive detention is too short to afford any real protection to the public and is unlikely to effect any change in the prisoner's habits.

The number of preventive detention establishments is limited and if they are filled with short term prisoners there will be difficulty in providing accommodation for those who have received substantial sentences in the public interest. Where, therefore, a court is not prepared to deprive an offender of liberty for a longer period than is involved in a sentence of six, or even seven, years, the sentence should be one of imprisonment, but where the court considers that the safety of the public demands that he be placed in preventive detention he should be sent for such a period as will be a real protection to the public. An offender can be sent to preventive detention for a longer period than would otherwise have been lawful under the statute against which he has offended.

APPEAL against sentence.

The appellant, Winston Anthony Churchill, was convicted on June 29, 1951, before the Recorder of Salisbury of warehouse breaking and stealing and on a second count of simple larceny. Nineteen other cases were taken into consideration and he was sentenced to five years' preventive detention.

The following statement of the appellant's record is taken from the judgment of the court. He was at the time of his conviction aged 31, and up to 1946 had had a series of convictions. Ignoring those before juvenile courts, in September, 1939, he was sent to Borstal for office-breaking, larceny and receiving, three other cases being taken into consideration. He seems to have only been detained in Borstal a short time and, in October, 1940, he was sentenced to 18 months at the assizes for larceny and two shop-breakings, and ten other cases were taken into consideration. He could only have been out of prison a few weeks before he was before a magistrates' court in November, 1941, for larceny and was given a chance by being bound over for 12 months. While still under recognizance he was charged with two offences of stealing money and received two sentences of five months to run consecutively. At the Middlesex quarter sessions in June, 1944, for office-breaking, larceny and possessing house-breaking implements by night and attempted office-breaking he received three years' penal servitude and other concurrent sentences. On this occasion eight other offences were taken into consideration. He was discharged from that sentence some time in June, 1946, and from that time until 1951 he kept out of trouble. He got employment with a coal merchant at Salisbury and lost that situation through no fault of his own. It was due to his employer's bankruptcy. He did receive from him an excellent testimonial. He got other employment but at the end of March and throughout April, 1951, he committed 19 different offences in addition to those for which he was indicted, many of which were shop or office-breaking, some of larceny and three or four of false pretences.

On April 3, 1952, the appellant applied for an extension of time and leave to appeal against sentence, giving as his reason that he had twice petitioned the Home Secretary to have his sentence changed from preventive detention to imprisonment and, on the second occasion was told that the Secretary of State had no power to alter the sentence. By his appeal he asked that his sentence be varied to one of imprisonment.

The appellant was not represented nor was he present.

LORD GODDARD C.J. The appellant in this case was convicted on his own confession as long ago as June 29, 1951, before the Recorder of Salisbury of warehouse-breaking and stealing and, on a second count, of simple larceny. Nineteen other cases were taken into consideration and he was sentenced to five years' preventive detention. On April 3 this year the prisoner applied for an extension of time in which to appeal against sentence, giving as his reason that he had petitioned the Home Secretary on two occasions to have his sentence changed from preventive detention to imprisonment and, on the second occasion, was told that the Secretary of State had no power to alter the sentence. In ordinary circumstances this court would not entertain an application for extension on this ground, certainly not after so long an interval and, moreover, where it was not suggested that the sentence was one which the recorder had not the power to pass, but as the sentence of five years' preventive detention is one which this court has not once but often stated should only be passed in the case of an offender of such an advanced age, or, we might add, such a state of health, that a longer sentence might lead to his dying, or at least spending his last days in prison, the court has given leave and will reconsider the matter, and at the same time, try once again to make it clear to recorders and courts of quarter sessions why it is undesirable to pass such a sentence as this.

[His Lordship stated the facts relating to the appellant's record, as set out above, and continued:] In his petition to the Home Secretary and in his notice of appeal the prisoner makes it clear that he is not appealing against the length of sentence, but merely asks that he should receive imprisonment and not preventive detention. It is not clear, therefore, why he desires to appeal, because the conditions of preventive detention, at any rate for the latter part of the sentence, are not as rigorous as ordinary sentences of imprisonment and he can earn remission, though, I believe, only to the extent of a sixth of the sentence instead of a third and this perhaps is a reason. But it does not follow because of this that the sentence is necessarily a proper one and, of course, a prisoner may feel that if he offends again it may go more hardly with him if his record shows a sentence of preventive detention.

The court has no desire to be censorious, but at the same time we think it must have been clear by the middle of last year that this court strongly disapproved of sentences of five years' or six years' preventive detention, except, as we have already said, in the case of an elderly prisoner who might be sentenced to a long term and spend his last years in a prison. The reasons why this court does disapprove of these sentences had, therefore, better again be restated, I hope with clarity, and also that attention will be paid to them.

The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large. There comes a time when it is not a question of punishment, for that has been shown to be of no use, and it therefore becomes necessary to put these offenders in confinement so that they can no longer prey upon the public. Parliament therefore obviously intended that in the case of such persons a court should be empowered to pass a longer sentence than they otherwise would have done, for the protection of the public, and can also send a man to preventive detention for a longer term than would otherwise have been lawful under the statute against which he had offended. As an illustration, and one that may often occur, we would take the case of attempted house-breaking. Although this court has recently held that for the misdemeanor of attempting to commit a felony a court is no longer restricted to passing a sentence of only two years, nevertheless there are many cases in which for an attempt no longer sentence would be passed in the case of a prisoner without a long record behind him. But if a person with a serious record of crime is detected in attempting to commit an offence but is arrested before he has time to perfect his intention, in many cases it is perfectly right to pass a sentence of preventive detention as by his committing the attempt he shows that he is continuing to live a life of crime. Now it is obvious that in view of the remission that, as we have already said, can be earned from a sentence of preventive detention, on a sentence of five years a prisoner will only be detained, if he behaves himself, for four years and two months, which is far too short a time to afford any real protection to the public, and moreover is unlikely to effect any change in the prisoner's habits.

Another matter which ought to be remembered is—and this applies equally to corrective training—that there are only a limited number of establishments which are set aside for these new forms of imprisonment. If the preventive detention establishments are filled up with prisoners sentenced to these short terms it is obvious that the Prison Commissioners may have difficulty in providing accommodation for those who have received substantial sentences in the public interest. This is one of the reasons why this court has said that it is undesirable to send anyone for corrective training where the Commissioners have reported that the prisoner is unsuitable. The fact that they have reported that he is suitable is not conclusive. It is for the court to decide whether to impose this sentence or not, but if he is reported as unsuitable it is most undesirable that this sentence should be passed because it means that the offender will be occupying a place which might be reserved for a man of whom the Commissioners think there is a chance that he may benefit.

With regard to preventive detention, we desire to repeat that if a court is of opinion, whatever a man's record may be, that for the particular offence or offences proved or admitted before it the court is not prepared to deprive him of his liberty longer than is involved in a sentence of five or six, and we would add seven, years, the sentence should be one of imprisonment except in the case of elderly men, with which we have already dealt. If the court is of opinion that the safety of the public demands that the offender should be placed in preventive detention he should be sent for such a period as will be a real protection to the public and not give them merely a respite from his activities for three or four years. In this respect we would, however, say that because the court has said that generally speaking the minimum period should be eight years there seems to be a tendency to turn that period into a maximum. The great majority of sentences of preventive detention that have come before this court have been cases in which a sentence of eight years has been passed. In many of them the records are such that sentences of 10, 12, or even the maximum of 14 years, would be well deserved. It is not a question of severity. As we have already said, when these sentences have to be passed the time for punishment has gone by. Punishment has had no effect. It has become a matter of putting a man where he can no longer prey upon society even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

We will now consider what the proper sentence upon this man should have been, but most emphatically it should not have been five years' preventive detention. He does not apply to be present so we can deal with the sentence at once. He asked that it should be changed to one of imprisonment instead of preventive detention, and that is what we propose to do. The sentence will be set aside and one of five years' imprisonment substituted, to date from conviction.

Appeal allowed.

J. F. L.

C. A.

1952
June 11.

Somervell,
Birkett and
Hodson L.JJ.

THE ASTON CHARITIES TRUST LD. *v.* THE METROPOLITAN BOROUGH OF STEPNEY.

Town and Country Planning—Compulsory acquisition of land—Notice to treat—Premises used as a Unitarian church and centre—War damage—Part of premises at date of notice let to business firm—intention to reinstate in another place—Land "devoted to a purpose of such a nature that there is no general demand or market "for land for that purpose"—Basis of assessment of compensation—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *r.* (5)—*Town and Country Planning Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 47), *ss.* 57 *and* 58.

In 1946 the Stepney borough council, in pursuance of a planning scheme, served on the owner of Durning Hall a notice to treat in respect of the compulsory acquisition of that property. The hall, which had been built for the religious and charitable purposes of a trust, had continued to be so used until 1942, when, in consequence of war damage and the exodus of a large part of the population of Stepney on account of bombing, the trustees let all but two rooms to a business firm. That was the position at the date of the notice to treat. Disputes having arisen as to the basis on which compensation should be assessed, the question was referred to the Lands Tribunal, which decided that the property was "devoted to a purpose of such a nature that there is no "general demand or market for land for that purpose," that there was a bona fide intention on the part of the trust to reinstate the hall in some other place, and therefore the compensation should be based on the reasonable cost of equivalent reinstatement, as provided by r. (5) of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. On appeal by the borough council:—

Held, that the words "devoted to a purpose" in r. (5) introduced a conception of intention and indicated a different test from that of the de facto use of the land at the date of the notice to treat; that the temporary interruption of "the purpose" due to the bombing could be disregarded; and that the fact that the intended reinstatement was to be four miles away from the original site and in another area raised only a question of fact for the tribunal, from whose decision the court saw no reason to differ. The appeal must therefore be dismissed.

APPEAL from the Lands Tribunal by way of case stated.

The plaintiffs, Aston Charities Trust Ld., a private company formed in 1930 to administer the charities endowed by Miss Durning-Smith, and later by Sir Edwin and Lady Durning Lawrence, owned Durning Hall, Stepney. The building had been designed and built for the religious and charitable purposes of the Trust, including a Unitarian church and ancillary activities. It had been exclusively so used until August, 1940, when, owing to war damage and the exodus from the neighbourhood of much of the local population, some parts of the building were unused. In 1944 unused parts of the building were let to a limited company for the purpose of storing and repairing organs from damaged churches, the Trust retaining only two rooms. The borough of Stepney suffered extensive damage during the war, and on February 25, 1946, under a re-housing scheme, the borough council served a notice to treat in respect of the compulsory acquisition of Durning Hall. Disputes having arisen as to whether compensation should be assessed under the general provisions of section 57 of the Town and Country Planning Act, 1944,[1] or under section 2, rule 5 of the Acquisition of Land (Assessment of Compensation) Act, 1919,[1] the question was referred to the Lands Tribunal, who decided that the premises came within section 2, rule 5, and assessed the compensation, calculated on the basis of prices ruling at the date of the notice to treat, at £18,480 11s. 2d.

The borough council appealed, and by their notice of appeal submitted that the compensation should be assessed, in accordance with section 57 of the Town and Country Planning Act,[1]

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[1] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5): "In assessing compensation an official "arbitrator shall act in accordance "with the following rules. . . . "Where land is, and but for the com-"pulsory acquisition would continue "to be, devoted to a purpose of such a "nature that there is no general "demand or market for land for that "purpose, the compensation may, if "the official arbitrator is satisfied "that reinstatement in some other "place is bona fide intended, be "assessed on the basis of the reason-"able cost of equivalent reinstate-"ment."

Town and Country Planning Act, 1944, s. 57: "Compensation for the "compulsory purchase of an interest "in land by a government depart-"ment or a local or public authority "within the meaning of the Acquisi-"tion of Land (Assessment of Com-"pensation) Act, 1919, compensation "to be estimated in connection with "such a purchase for damage sus-"tained by reason of the severing of "land the subject thereof from other "land held therewith or otherwise "injuriously affecting such other "land, and compensation under sec-"tion sixty-eight of the Lands "Clauses Consolidation Act, 1845, in "respect of land injuriously affected "by the execution of works on land "acquired by such a department or "authority, shall, except in the case "of compensation assessed on the "basis specified in rule (5) of the "rules set out in section two of the "said Act of 1919, be assessed sub-"ject to the rule following, that is to "say:— . . . by reference to prices "current at the thirty-first day of "March, 1939, on the assumption "that the interest had at that date "been subsisting as it was in fact "subsisting at the time of service of "the notice to treat, and that the "land in which interest subsisted, "and any such other land, had been "at that date in the state in which "it in fact was at the time of service "of the notice to treat."

S. 58 provides for a discretionary supplement in the case of an owner-occupier.

1944, with an owner-occupier supplement as to that part of th premises occupied by the claimants at the time of the date o the notice to treat, at £6,720.

Mitchison Q.C. and *Stuart Horner* for the borough council. A the time when notice to treat was served by the borough counci only two rooms in this large building were being used in connexio with Unitarian Church activities, the remaining rooms having bee let to a firm of organ builders and repairers. The question therefore is whether compensation fell to be assessed under section 5 of the Town and Country Planning Act, 1944, which excepts case under rule 5 of section 2 of the Acquisition of Land Act, 1919 which applies to land "devoted to purposes of such a nature tha "there is no general demand or market for land for that purpose.' The Lands Tribunal decided that at the time of the notice to trea Durning Hall was such a place. In order for rule 5 to apply a all the Lands Tribunal must also be satisfied that "reinstatemen "in some other place" is bona fide intended. The defendants contention is that rule 5 cannot apply because (1) there was n proper intention to reinstate; (2) that at the time of the notic to treat it was impossible to say that the building was "devoted ' to religious or charitable uses; (3) that the owner-occupier supplement is only payable for the two rooms used for church purpose and not for the whole building. The words of rule 5 are: "Wher "land is, and but for the compulsory acquisition would continu "to be, devoted to a purpose . . ." That must mean at the tim of the notice to treat and therefore the court is not concerned wit the law after that date. It is submitted that the Lands Tribuna has been confused by the religious character of the Trust "Devoted" means nothing more than exclusively used. Th question therefore is what was the de facto use at the time of th notice to treat. The minutes of the Trust show that as fro March, 1945, they were giving serious consideration to closin down, and it is difficult to come to the conclusion that there wa a bona fide intention to reinstate. Reinstatement in a differen locality, four miles away, does not come within the words of th rule. There is a lack of identity. As to the owner-occupie supplement, the Trust cannot claim compensation for that par of the building of which it was not the occupier.

Geoffrey Lawrence Q.C. and *J. Comyn* for the Trust. T give to "devoted" the meaning of "used" or "occupied and "used" is to debase the connotation and meaning of the word. It is quite clear that the true connotation of the word involves a transcendental purpose. Therefore it is a question of fact whether or not this land was devoted to such a purpose for which there was no general demand. Clearly, also, there was no abandonment of the purpose of the Trust. There was every intention, as soon as the war was over, to continue the activities which had been followed since the formation of the Trust, and the lease to the company had been carefully framed so as to be terminable on short notice at the end of the war with Germany. The question whether there was an intention to reinstate was one of fact for the Lands Tribunal. The rule does not say "some "other place within the parish or locality."

SOMERVELL L.J. [having read the relevant sections of the Acts of 1919 and 1944, and stated the facts, continued]: At the cost of a little repetition I will now go to the case stated: "The "said property was designed and built for the religious and "charitable purposes of this Trust and has been used exclusively "for such purposes until August, 1940, when, owing to war "damage and the exodus from the neighbourhood of much of the "local population in whose interests the Trust was administered, "some parts of the building remained unused by the claimants." Then the case sets out the events of 1942, the removal of the organ to one of the lower rooms by Messrs. Kingsgate Davidson & Co. Ld., and the agreement at a somewhat later date between the Trust and that company that that company should have the use of the rooms, to which I have referred, for storing and repairing organs from other damaged churches. There was a lease on September 4, 1944, which was for the period of the war and thereafter, subject to six months' notice on either side. The case goes on to find as a fact that the "letting to Messrs. Kingsgate Davidson & Co. Ld. was necessitated by circumstances "beyond the control of the claimants, and it was the intention "of the lessors to terminate it and resume possession of the "premises for the purposes of the Trust as soon as possible after "the termination of the war with Germany," and then there is a reference to the minutes. Then there is a finding: "Up to the "date when the occupation by Messrs. Kingsgate Davidson & "Co. Ld. commenced the said land was devoted to a purpose of "such a nature that there was no general demand for land for "that purpose."

Mr. Mitchison, for the council, does not dispute that before the war this hall, as it then was used, came within rule 5. The nature of his argument in the present circumstances I will deal

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with later. Then paragraph (ix) of the case says: "As from the "date of the notice to treat the claimants have made diligent "search for alternative premises in which to carry on the objects "of the Trust and have had the funds to do so; and it was, and "is, their bona fide intention to reinstate the said premises in "some other place." Then the various contentions are set out, with some of which we are not concerned. The main contention for the Trust is that the compensation should be assessed in accordance with rule 5 of section 2, and the main contention of the other side is that compensation should be assessed in accordance with section 57 of the Town and Country Planning Act, 1944. Then the case deals with the figures. There was some dispute as to the date at which the reasonable cost of reinstatement for the purposes of rule 5 should be taken. The Lands Tribunal decided that in favour of the council; they decided on the lower figure and from that there is no appeal.

We then come to the findings, and the first is this: "That "for the purpose of rule 5 of section 2 of the Acquisition of Land "(Assessment of Compensation) Act, 1919, the meaning of the "word 'devoted' in relation to land differs from the meaning of "the word 'used,' and there may be circumstances in which "the Tribunal may decide that land which is devoted to purposes "of such a nature that there is no general demand for land for "such purposes may continue to be so devoted while being tem"porarily used for purposes not so qualifying." The first question is whether that is right in law. Mr. Mitchison, on behalf of the council, submits that these words "Where land is, "and but for the compulsory acquisition would continue to be, "devoted to a purpose of such a nature" point to the de facto use at the time of the notice to treat. That is his test, subject, of course, to de minimis. As he said, if it happened that on the day of the notice to treat premises in question were temporarily let for a day or some short period to some other body, that, of course, could be disregarded. Substantially, he submits that the section points to the de facto use at the time of the notice to treat. On this matter I have come to the conclusion that the Tribunal were right. I think the words "devoted to a purpose" introduce a conception of intention and are indicating a different test from that of the de facto use at the date of the notice to treat. Circumstances created by bombing, of course, all over the country caused a temporary interruption of the purposes to which many pieces of land were devoted. I think the Tribunal were right in holding that interruption of that kind, which did affect the de facto use at the date of the notice to treat, could be disregarded. The point is a very short one and I do not think it is capable of much elaboration. I agree with the way in which it is put by the Lands Tribunal in the paragraph which I have read.

Having laid down, as I think rightly, that the words used in rule 5 have that elasticity, it seems to me that the next paragraph indicates that the Tribunal have properly addressed their minds to the facts of this case. " (ii) That having regard to the circum-" stances of and leading up to the aforesaid letting to Messrs. " Kingsgate Davidson & Co. Ld. the said premises continued to " be devoted to the special purposes aforesaid during the " currency of the said letting and were so devoted on the date of " the notice to treat." I think, therefore, the first point taken by Mr. Mitchison, for the council, fails.

The second point was with regard to reinstatement. I have read the paragraph in the case in which, following the words of rule 5, the case finds as a fact, proved or admitted, that it was and is the Trust's bona fide intention to reinstate the said premises in some other place. The main controversy below appears to have been based—and I fully accept what Mr. Mitchison told us—on the fact that the evidence such as there was contained in the minutes of the Trust, and I dare say some further evidence by a Mr. Avery, indicated that the trustees were proposing to set up a similar church and centre, not in Stepney, but some four miles away in Forest Gate. Mr. Mitchison submitted that that was too far away and that there was not sufficient identity therefore in law to satisfy the word "reinstate," which is to be found in the section. I think this becomes a question of degree and of fact. Various examples were given in the course of the argument, and I do not propose to repeat them. Examples of where reinstatement in the ordinary sense might, having regard to the purpose, take place a long way off and still be described as reinstatement in the ordinary sense were given. On the other hand, one can imagine a purpose confined locally to a narrow area in which, if the same sort of activity was started somewhere else, it might be said not to be reinstatement. Mr. Mitchison submits there is in this case not sufficient identity. It must, in my opinion, be a question of degree, and having regard to the facts as they appear from the minutes I am not satisfied that in dealing with this question, which is a question primarily

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of fact, the Lands Tribunal in any way misdirected themselves or misconstrued the words of the section. For these reasons I think the two points taken by Mr. Mitchison on behalf of the council fail. The third point, which would have arisen if he had succeeded, does not arise, and, in my opinion, the appeal should be dismissed.

BIRKETT L.J. I am of the same opinion, and there is really nothing that needs to be added. It is enough for me to say that I think the Lands Tribunal addressed themselves to the true issues in this case, and that in paragraph 10 (i) and (ii) and paragraph 5 (ix) of the case they put the proper construction upon the section to be construed, and I see no reason at all to differ from them. I agree with the judgment of my Lord.

HODSON L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *J. E. Arnold James, Town Clerk, Stepney; Cummings, Marchant & Ashton.*

A. W. G.

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May 22;
June 10.

Lord Goddard C.J., Devlin and Gorman JJ.

NATIONAL ASSISTANCE BOARD *v.* WILKINSON.

Husband and Wife—Maintenance—Desertion by wife—Wife in receipt of assistance under the National Assistance Act, 1948—*No liability of husband under National Assistance Act,* 1948, *to maintain wife—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43.

A wife who had refused to join her husband in accommodation found by him received assistance under Part II of the National Assistance Act, 1948. The National Assistance Board preferred complaints against the husband and applied for orders to be made upon him under section 43 of the National Assistance Act, 1948, to repay the amount of assistance paid to the wife and to pay such sum weekly or otherwise as the court might consider appropriate. Before the justices it was contended on behalf of the board that by section 42 (1) a husband, for the purposes of the Act, was absolutely liable to maintain his wife. The justices found that the wife had deserted her husband and, holding that the husband's liability under section 42 (1) of the Act to maintain his wife was not absolute and that the words of section 43 (2) enabled them to have regard to the conduct of the wife, dismissed the complaints. On appeal by the board:—

Held, that neither by the common law nor by the poor law was a husband ever liable to maintain an adulterous wife nor a wife who refused to live in the matrimonial home which he had provided, there being a distinction between adultery and desertion in that an adulterous wife forfeited all rights of maintenance while a deserting wife's right to maintenance was only suspended; that a statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words pointing unmistakably to that conclusion and that, therefore, notwithstanding the changes in the law made by the National Assistance Act, 1948, and the words "For the purposes of this Act" prefacing section 42 (1) that section cannot be construed in such a way as to take away from either spouse the defences which have always been open to them against a claim for maintenance, whether arising out of the common law or the poor law statutes. A husband, therefore, being no more liable, since the Act of 1948, to support an adulterous or deserting wife than he was before, the decision of the justices was correct.

Rule of construction in *Minet* v. *Leman* (1885) 20 Beav. 269, 278 applied.

Quære, whether, in making an order for payment upon a husband under section 43 (2), where assistance has been given to his wife under Part II of the Act, it is open to the justices, in taking into consideration all the circumstances, to consider the conduct of the wife, and to hold that no payment is appropriate.

Case stated by Durham justices.

Two complaints under the National Assistance Act, 1948, were preferred by the National Assistance Board against the respondent, George Wilkinson, alleging that he was the husband of Edith Wilkinson, whom he was liable to maintain pursuant to section 42 of the National Assistance Act, 1948, and by reference to whose requirements assistance under Part II of the Act had been given between April 30, 1951, and October 22, 1951, amounting to £26 18s. at the rate of £1 4s. 6d. a week, and to whom assistance continued to be given at that rate, and applying for a summons to be served upon him to show cause why an order should not be made upon him under section 43 of the Act to repay the sum of £26 18s., and to pay such sum, weekly or otherwise, as the court might consider appropriate.

At the hearing of the complaints by the justices, the following facts were proved or admitted: The husband was married to Edith Wilkinson on March 16, 1949, and by agreement between him and his wife the matrimonial home was set up in the house of the wife's mother, who was unwell. On the whole, the marriage was a happy one although there were trivial differences between the husband and his mother-in-law. In December, 1949, a child of the marriage was born. In January, 1951, the husband left the matrimonial home and went to live with his own parents. Until February, 1951, he paid the wife £2 weekly by way of maintenance for herself and the child, and thereafter, until the issue of the complaints, he paid her 15s. in respect of the maintenance of the child. The wife, by reason of her mother's health and the need to look after the child, was unable to earn any money. Meanwhile, the husband found two rooms which were about to become vacant and invited the wife to join him there, but the wife, having inspected the rooms, refused to join him. The rooms were still available at the time of the hearing of the complaints but the wife persisted in her refusal. The husband was earning between £7 and £8 a week and had no unusual expenses which would prevent him from being able to make a proper payment for her maintenance. The wife was in receipt of assistance to the amount and in the manner alleged.

On behalf of the board it was contended that for the purposes of the National Assistance Act, 1948, a husband was at all times liable to maintain his wife; that even if the wife could not obtain an order for maintenance against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, the board were entitled to orders against the husband under section 43 [1] of the Act; and that the provisions of section 43 (2) did not permit the court to disregard the absolute liability of the husband to maintain the wife, at least to the extent of the assistance granted to her, or which would be so granted but for any payments on account of maintenance made by him to her.

It was contended on behalf of the husband that section 43 (2) of the National Assistance Act, 1948, directed the court to have regard to all the circumstances, which included the wife's conduct; that on the facts of the case the wife had deserted the husband; and that he was no longer liable to maintain her.

The justices found that although the accommodation offered was inferior to that in the wife's mother's house, the wife was not justified in refusing to join her husband in the rooms; that the rooms were still available; that the wife still refused to join the husband; and that such refusal was unreasonable. The justices accordingly held her to have deserted him. They considered that the husband's liability under section 42 [2] of the National Assistance Act, 1948, was not absolute, and that the wording of section 43 (2) enabled them to have regard to the conduct of the wife, and they dismissed the complaints.

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[1] National Assistance Act, 1948, s. 43: "(1) Where assistance is given "or applied for by reference to the "requirements of any person . . . the "Board . . . may make a complaint "to the court against any other per-"son who for the purposes of this Act "is liable to maintain the person "assisted. (2) On a complaint under "this section the court shall have "regard to all the circumstances and "in particular to the resources of the "defendant, and may order the defen-"dant to pay such sum, weekly or "otherwise, as the court may consider "appropriate."

The board appealed.

J. P. Ashworth for the board. Observations of the court in *Aldritt* v. *Aldritt*,[3] a decision of the Divisional Court of the Probate Divorce and Admiralty Division, although not on all fours with the present case, support the contentions of the board, but it is interesting and necessary to consider the history and development of legislation on this matter.

Before 1927 there was no statute which in terms enacted that a husband was liable to maintain his wife. The history begins with the Poor Relief Act, 1601, which by section 6 enacted that a father, grandfather, mother, grandmother, and children should maintain a poor person, but at common law a husband was liable to maintain his wife although that liability might be displaced by her adultery or suspended by her desertion. In the nineteenth century several Acts were passed dealing with the possibility of recovering from the husband, or other persons, assistance or maintenance paid by the guardians—see, for example, the Poor Law Amendment Act, 1868, s. 33—and the husband might also be criminally liable under section 3 of the Vagrancy Act, 1824. *Jones* v. *Guardians of Newtown and Llanidloes* [4] and *Culley* v. *Charman* [5] show the position under the old acts; it is submitted that the former case shows that the guardians had a statutory right to recovery where the common law liability of the husband still subsisted.

The Poor Law Act, 1927, expressed to be a consolidating Act, added, by section 41 (1), the husband to the five persons liable for the maintenance of the poor, provided that he had sufficient means; the Poor Law Act, 1930—see sections 14 and 19—re-enacted the provisions of the Act of 1927, substituting for the guardians the local Assistance Board. Before 1927, therefore, the position was that a husband was not liable to maintain his wife if she had committed adultery or was in a state of desertion; after 1927, he was not liable to maintain her unless he had sufficient means; it is an open question whether he was still not liable to support her if she had committed adultery or had deserted him. The Act of 1927 introduced a new defence of insufficient means, but that defence went to quantum only. At common law, however, the husband was liable irrespective of means: see *Middlesex County Council* v. *Nathan*[6] and *Llewellyn* v. *Turner*,[7] which show that the rights of the guardians were separate and effective and not affected by any separation and agreement between husband and wife.

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[2] National Assistance Act, 1948, s. 42 (1): "For the purposes of this "Act—(*a*) a man shall be liable to "maintain his wife and his children, "and (*b*) a woman shall be liable to "maintain her husband and her "children."

[3] June 12, 1951 (unreported).

[4] [1920] 3 K.B. 381.

[5] (1881) 7 Q.B.D. 89.

In 1927 the husband had two defences, the conduct of the wife, and insufficiency of his means; the relevant provisions of the Act of 1927 were re-enacted by the Poor Law Act, 1930, but the National Assistance Act, 1948, swept both these defences away, and made wide and sweeping changes in the law—see the title, "An Act to terminate the existing Poor Law" and section 1, "The existing Poor Law shall cease to have effect." Section 64 defines the existing Poor Law as the enactments in Part I of Sch. VII, and by that schedule the whole of the Poor Law Act, 1930, is repealed.

The change made by the Act of 1948 in the developed law regarding the duties and obligations of relatives is real and fundamental. The liability to maintain his wife imposed on a husband by section 42 is absolute; it is impossible to write any qualification into the section. The statutory defence of insufficient means is gone and is now brought in as to quantum only for the words "all the circumstances" which appeared in previous legislation in the liability section now appear in section 43 (2), which is not concerned with liability but with the amount which the husband shall pay.

The case for the board is that in 1927 Parliament was still concerned with the duty of persons to maintain poor relations; if they did not maintain them it was the duty of the guardians to do so and a right of recovery by the guardians was provided. The Act of 1948 approaches the problem in a different manner; sections 4 and 5 provide a broad system of welfare and lay down that it is the duty of the board to provide for the poor, and it is only in the group of sections concerned solely with the recovery of expenses under the general heading "for the purposes of this "Act" that it is laid down that a husband and wife shall be respectively liable to maintain each other. The board has the same duties as had the guardians and it is to be expected that it would be given the same rights.

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[6] [1937] 2 K.B. 272.

[7] (1922) 126 L.T. 532.

In *Rex* v. *Flintan*[8] the liability of the husband under the Vagrancy Act, 1824, was interpreted to mean his common law liability and the wife's adultery was held to be a defence. That cannot be so under the Act of 1948 because section 42 begins with the words "For the purposes of this Act." The same words are used in section 43 (1). The common law liability remains unaffected but section 42 imposes a special statutory liability, for the very limited purposes of the Act, and introduces a new form of liability. That initial phrase in section 42 shows that the words following must be given their full meaning without qualification and without having read into them the defences which existed under prior statutes or which exist at common law. Those defences, as defences to liability, cannot be implied from the words "all the circumstances" in section 43 (2), which is not concerned with liability.

It is not for the justices to consider whether a wife is in need of assistance; that is the duty of the board. The "circumstances" to be considered by the justices are all the circumstances of the defendant to the summons, in particular his financial position; an agreement or a separation between husband and wife is not one of the circumstances the justices must consider: see *Llewellyn* v. *Turner*[9] and *Dinning* v. *The Guardians of the South Shields Union.*[10] From 1868 the expression "all the circumstances" has been used in legislation on the subject but it has never included the conduct of the wife; it is submitted that it would be strange if those words were now construed so as to make her conduct a factor, particularly when the husband's other defence has been expressly brought in, but as to quantum.

Barry Sheen for the husband. Assuming that section 42 of the National Assistance Act, 1948, is unqualified, it is submitted that section 43 is governed by its opening words, "Where assistance is given or applied for by reference to the requirements of "any person . . . ," and that it is a condition precedent to a complaint before the justices that the wife requires assistance. In view of the definition of "requirements" in section 64, that word must be given the natural and accepted meaning of needs, for example, a roof, food and clothing. Whatever the position may be of a wife who has committed adultery, a wife who is in a state of desertion, and whose husband offers her a home, is not in need and has no requirements. "Needs" and "requirements" are synonymous; both the preamble to the Act and section 1 refer to the relief of persons in need; sections 5, 6 and 7 and the rules made under them for the assessment of requirements are prayed in aid because it is clearly not intended that regulations are to provide that, in assessing the needs of the wife, the means of the husband are to be taken into account. *Richards* v. *Coleman*[11] is relied on; the only difference between that case and the present is that it was under another Act, and there it was held that "requires" meant the circumstances in which assistance was required. It is submitted that the board were in error in concluding that the wife required relief and that, once complaints had been laid, it was open to the justices to take the view that if assistance was given it was not in fact given with reference to the wife's requirements; if that be so there is no ground for the complaints. The duty imposed by section 43 is discretionary and the justices were entitled to find as they did.

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[8] (1830) 1 B. & Ad. 227.

[9] 126 L.T. 532.

[10] (1884) 13 Q.B.D. 25.

The only purpose of the words "For the purposes of this Act" in section 42 is to reduce—and in one instance enlarge—the class of persons who must pay contribution to the board. By the Act of 1601 five persons were responsible for the maintenance of their poor relations—now it is husband and wife. Section 42 is a declaratory section saying who are the persons against whom an order may be made.

It follows from *Reg.* v. *Fordham*[12] and *Jones* v. *The Guardians of Newtown and Llanidloes*[13] that before 1927 no order would be made against a husband whose wife was in a state of desertion or who had committed adultery. The Act of 1927 left the same defences open to the husband. *Aldritt* v. *Aldritt*[14] was a case concerned with consensual separation and the remarks relied on by the board were obiter. It is submitted that the 1948 Act has not made so sweeping and fundamental a change in the law as to support the board's contention. If a husband's liability is absolute it might be that he would have to support a wife living in adultery with another man. If the liability of a husband is absolute, so also is that of the wife under the Act; if the law has in fact been altered then a wife might have to maintain a husband who had deserted her. Stronger words than those in section 42

[11] (1919) 88 L.J.K.B. 813.

[12] (1888) 5 T.L.R. 27.

[13] [1920] 3 K.B. 381.

[14] June 12, 1951.

are needed to effect such an alteration, which would not only endanger the modern machinery of conciliation but would encourage divorce.

J. P. Ashworth in reply. The justices found that the wife was in receipt of assistance to the extent alleged. It is not open to the husband to say that assistance was not properly given. The cardinal distinction between this case and *Richards* v. *Coleman*[15] is that here the question is not whether the wife requires assistance but whether she has applied for or has been given it. It is not contended that in every case the justices must order the full amount of assistance that has been given to be paid by the defendant, but that the conduct of the assisted person is no ground for reducing the amount ordered to be paid.

Cur. adv. vult.

June 10. LORD GODDARD C.J. This is a special case stated by justices for the County of Durham before whom two complaints were preferred by the appellant Beattie, an officer of the National Assistance Board, the first alleging that the respondent was the husband of Edith Wilkinson, whom he was liable to maintain pursuant to section 42 of the National Assistance Act, 1948, and by reference to whose requirements assistance amounting to £26 18s. 0d. had been given to her between April 30 and October 22, 1951, and asking that the respondent should show cause why an order should not be made upon him under section 43 of the Act to repay the said sum. The second complaint was that he should show cause why an order should not be made upon him under the section to pay such sum, weekly or otherwise, as the court might consider appropriate. The justices dismissed both complaints.

[His Lordship stated the facts substantially as set out above and continued:] The contention of the board was that section 42 of the National Assistance Act, 1948, imposes an absolute obligation on a husband to maintain his wife and that if assistance is given to her by the board they have a right to apply for an order against him, on the ground that his liability exists notwithstanding that his wife may unreasonably refuse to live in a home which he has provided, or may even have deserted him for such length of time as would entitle him to apply for a divorce, or even if she has committed adultery. In short that so long as the marriage exists and has not been dissolved the husband can have no answer to the claim.

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[15] 88 L.J.K.B. 813.

[His Lordship read sections 42 and 43 and continued:] The justices, having found that the wife was in a state of deserting her husband, were of opinion that the liability under section 42 was not absolute and that the wording of section 43 (2) enabled them to have regard to the conduct of the wife, and, being of opinion that the husband was not liable to maintain his wife under section 42, dismissed the complaints.

Before dealing specifically with the contentions advanced on behalf of the appellant it is necessary briefly to state the course of legislation which has led to the right of authorities giving poor relief to recover from a husband some amount for the maintenance of his wife. The Act which established the Poor Law is the well-known 43 Eliz. c. 2, and by section 6 of that Act it is provided that "the father and grandfather, and the mother and grand-" mother, and the children, of every poor, old, blind, lame and "impotent person, . . . being of a sufficient ability, shall at their "own charges relieve and maintain every such poor person, in "that manner and according to that rate, as by the justices of "peace of that county, where such sufficient persons dwell, or "the greater number of them, at their general quarter sessions "shall be assessed; upon pain that every one of them shall forfeit "twenty shillings for every month which they shall fail therein." It will be observed that a husband is not mentioned in the section, no doubt for the reason that a husband was and is by common law bound to maintain his wife, and the remedy of a wife at common law if her husband failed to maintain her was to pledge his credit. The obligation of the other relatives to maintain members of the family which is imposed by the section is to be enforced by a penalty, but there was no provision for the overseers to recover the cost of any relief which they might give. By the Vagrancy Act, 1824, a person who wilfully refused or neglected to maintain his family was by section 3 liable to be dealt with as an idle and disorderly person and was punished by imprisonment and on a second offence could be dealt with as a rogue and vagabond and thereafter as an incorrigible rogue and became liable to the penalties imposed by the statute. In 1834 Boards of Guardians were established by the Poor Law Amendment Act of that year and the whole administration of the Poor Law was reformed and from that time forward Unions were established and the administration of the Poor Law was placed under Boards of Guardians. The first Act which enabled the cost of the maintenance of a wife to be recovered from a husband by an order of the court was the

Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101). That Act dealt only with the recovery of the cost of maintenance of a lunatic married woman maintained in an asylum or registered hospital and who had thereby become chargeable to the Union. By section 5 the guardians could obtain an order on the husband to pay such sum weekly or otherwise towards the maintenance of the lunatic as after a consideration of all the circumstances should appear to the justices to be proper. A considerable addition to the law was made by the Poor Law Amendment Act, 1868, which by section 33 provided that when a married woman requires relief without her husband, the guardians of the Union or the overseers of the parish to which she becomes chargeable may apply to the justices to require the husband to show cause why an order should not be made upon him to maintain his wife, and the justices, after a consideration of all the circumstances of the case, could make such order as they thought proper. And so the matter remained until the passing of the Poor Law Act, 1927, which, as its title shows, was an Act to consolidate the enactments relating to the Relief of the Poor. By section 41 (1) of that Act it is provided that "It shall be the duty of the father, grandfather, "mother, grandmother, husband or child, of a poor, old, blind, "lame and impotent person, or other poor person not able to "work, if possessed of sufficient means, to relieve and maintain "such person," and this is the first time that the obligation of a husband appeared in a statute. The reason would seem to be that as the Act was a consolidating Act, and as the immediately succeeding sections deal with the liability of the husband to have an order made against him for the maintenance of his wife, it was thought right to include him in the section dealing with the liability to relieve and maintain relatives, for there was never any doubt that so far as a wife is concerned a husband always had been liable at common law, though as is well known a father was under no civil liability apart from the Poor Law to maintain his children. True if he failed to do so he would become amenable to the criminal law, but a child never had the right to pledge the father's credit as the wife could her husband's, and there is no doubt, anomalous as it may seem, a father is not by the civil law liable for a child's maintenance. The whole of the Act of 1927 was repealed by the Poor Law Act of 1930. The sections to which I have referred were repeated in that Act in exactly the same terms and no change was made in this position by reason of the repeal and re-enactment.

There can be no doubt that neither by the common law nor by the Poor Law was a husband ever liable to maintain an adulterous wife nor a wife who refused to live with him in the matrimonial home which he had provided, at least unless she had good cause for so refusing. The distinction between adultery and desertion was that an adulterous wife forfeited all rights of maintenance while a deserving wife's right to maintenance was only suspended. In *R.* v. *Flintan*,[16] Littledale J. said with regard to an adulterous wife,[17] "having rendered herself unworthy of her "husband's protection, she returns to the same state as if she "were not married" and [18] "if the husband is not obliged to "answer for the wife's contracts, or to receive her into his house, "it cannot be said that he is 'legally bound to maintain her.'" That case was quoted in *Culley* v. *Charman*,[19] where it was held that a husband was not liable to have an order made against him under the Poor Law Amendment Act of 1868 to maintain a wife with whom he ceased to cohabit in consequence of her adultery, and the difference between the position of an adulterous wife, and one who refused without justification to live with her husband, was pointed out in *Jones* v. *Guardians of Newtown and Llanidloes*,[20] where it was stated that the husband's obligation was only suspended as long as she continued wilfully to absent herself. During that time it was quite clear that he was not bound to maintain her and he could not be ordered to do so. It is said that the National Assistance Act, 1948, has entirely altered the law on this subject and that a husband is liable to an order being made against him to maintain his wife whether she be guilty of adultery or desertion, provided only that she becomes in need of assistance and obtains it from the board, and Mr. Ashworth did not shrink from the position that it would follow that if a woman left her husband to live in adultery, and the man with whom she was living and continuing to live fell out of work, so that she had to seek support from the board, her husband would still be liable to maintain her unless and until he ceased to be her husband by a decree of divorce. This would indeed be a remarkable result, and it is difficult to believe that Parliament could have had any such intention. It is said that this construction is unavoidable by reason of the section being prefaced by the words "for the purposes of this Act," but it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet* v. *Leman*,[21] Sir John Romilly M.R. stated as a principle of construction which could not be disputed that[22] "the "general words of the Act are not to be so construed as to alter "the previous policy of the law, unless no sense or meaning can "be applied to those words consistently with the intention of "preserving the existing policy untouched." In my opinion it is perfectly possible to give an intelligent meaning to section 42 while bearing in mind to the full the prefatory words, without construing it in such a manner as would make a husband liable, for the first time in the history of the law, to maintain a wife who was either living in adultery or refusing to live in the home which he had provided, and where he was willing to receive her, and indeed would equally compel a wife to maintain a husband from whom she had been obliged to depart by reason of his brutality, or who might himself be living in open adultery with another woman. It is impossible to suppose that Parliament intended this section to have any such effect. In my opinion it was inserted for the purpose of limiting the class of persons who were liable to maintain a family. The obligation of children to maintain their parents has disappeared, the obligation by grandparents or to grandparents has disappeared. From the passing of the Act husband and wife have to support the other and have to support their children, but it is not necessary to hold that this section takes away from either spouse the defences which have always been open to them against a claim, whether arising out of the common law or the Poor Law statutes, and in my opinion a husband is no more liable since the Act of 1948 to support an adulterous or deserting wife than he was before.

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[16] 1 B. & Ad. 227.

[17] Ibid. 230.

[18] Ibid. 231.

[19] 7 Q.B.D. 89.

[20] [1920] 3 K.B. 381.

Before parting with this branch of the case I ought to refer to the unreported case of *Aldritt* v. *Aldritt*,[23] in which a Divisional Court of the Probate, Divorce and Admiralty Division, consisting of Lord Merriman P. and Havers J., gave judgment on June 12, 1951. The case appears to be unreported but we were supplied with a copy of the judgments, and it may be that it was some expression of opinion in that case that induced the National Assistance Board to bring the present proceedings. That was a case in which a wife applied, under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, for a maintenance order against her husband on the ground of wilful neglect to provide reasonable maintenance. The justices had made an order upon him and in allowing the appeal the court pointed out that there had been a consensual separation and that as the husband had not been proved to have either expressly or impliedly agreed to maintain the wife notwithstanding the separation she could not obtain an order. The court were following a previous decision of *Baker* v. *Baker*.[24] It is true that both members of the court, in giving their judgments, did express the opinion indicating that if proceedings were taken by the National Assistance Board against the husband he might have no answer to it and indeed Havers J. is reported as saying: "Under the "National Assistance Act, for the purposes of that Act, a man "appears to be under an absolute liability to maintain his wife "and children, and a woman seems to be exactly in the same "position in regard to her husband and her children." How far the point which now falls for the express decision of this court was argued in that case does not appear, but it seems clear at any rate that the court did not review the Poor Law legislation as we have been obliged to do to decide the matter now before us. We may, therefore, say with all respect that any expression of opinion to which they gave effect was obiter, and they certainly did not decide that the National Assistance Board were entitled in all the circumstances to recover from the husband the relief they had given to his wife without regard to the circumstances which had led to his not supporting her.

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[21] (1855) 20 Beav. 269.

[22] Ibid. 278.

[23] June 12, 1951.

This is enough to dispose of the case, but I should certainly also agree with the magistrates that among the considerations which they were entitled to regard was that the husband was always ready in this case to provide a home for his wife, and that it was open to them therefore to consider that no payment was appropriate in such a case, but I should regret having to decide the case entirely on that ground, because that might put an adulterous wife in a better position than a deserting wife. As I have already said, a deserting wife's right is only suspended, and if she returns to her husband her right of support revives. An adulterous wife has no right to return to her husband, and so if this court had to give effect to the decision of the board it would seem to follow that the justices could not consider her conduct in this respect, while in the case of a deserting wife they could consider the fact that the husband was willing to receive her home.

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[24] (1949) 66 (Pt. 1) T.L.R. 81.

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For these reasons I am of opinion that the justices came to a correct decision in point of law and I would dismiss the appeal, and would like to express my appreciation of the careful and sensible way in which the justices dealt with the matter.

DEVLIN J. I agree. It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. Accordingly, if the words "a man shall be liable to maintain his wife" in section 42 of the National Assistance Act, 1948, stood by themselves, I should read them subject to the common law, and should not conclude that they were intended to disturb the principle that a wife forfeited her right to maintenance by the commission of a matrimonial offence. Against this it is argued that the initial phrase "for the purposes of this Act" makes it possible to give the wide words that follow their full meaning without altering the general law. The same sort of wide words was, however, used in the Poor Law Act, 1927, s. 41 (1), which provides that it shall be the duty of a husband of a poor person to maintain her. These words are not subject to any limitation of the purposes of the Act, and they are moreover contained in a consolidating Act. I could not, therefore, hold that the Act of 1927 altered the common law; and it is noteworthy that no one has in 20 years ever suggested that it did. But if words of this sort are not to be widely and literally construed in 1927, why should they in 1948? The qualifying phrase "for the purposes of this Act" is not, in my judgment, sufficient to effect the alteration. The use of the phrase is sufficiently explained by the inclusion in the section of a novel liability in the case of women, and by a wish to avoid the consequences, as demonstrated in *Middlesex C.C.* v. *Nathan*,[25] of the unrestricted words in the Act of 1927.

It is another principle of statutory construction that the court leans against an interpretation which produces unjust and arbitrary consequences. I think it would be unjust if a husband were compelled to support a wife in open and admitted adultery; and it would be arbitrary if the amount of money he had to spend on her depended on the speed with which he was able to obtain his decree absolute.

GORMAN J. [read by Devlin J.]. I agree, and would merely add that I am quite unable to accept the contention that the effect of the words "for the purposes of this Act," in section 42 (1) of the National Assistance Act, 1948, is to make it possible to give to the words following their full and wide meaning without altering the general law.

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[25] [1937] 2 K.B. 272.

Appeal dismissed.

Solicitors: *The Solicitor, Ministry of National Insurance and National Assistance Board; Field, Roscoe & Co., for Dowling & Hewitt, Bishop Auckland.*

J. F. L.

1952
May 15.

Lord Goddard C.J., Jones and Parker JJ.

REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER. *Ex parte* PRACTICAL BANKING LD.

Master and Servant—Industrial Disputes Tribunal—Jurisdiction—Reference of issue to tribunal by minister—Distinction between "dispute" and "issue"—Whether employer bound by general wages agreement—Wages of one employee only in question—Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *art.* 2.

Representatives of employers and workmen agreed on the terms and conditions of employment which were to apply to the trade concerned in a particular district. An employer in the district, who was not a member of the organization of employers which negotiated the agreement, refused to observe the terms agreed as to wages in the case of a particular employee who was a member of the union which negotiated the terms with the employers. The employees' union, pursuant to art. (2) of the Industrial Disputes Order, 1951, reported the matter to the Minister of Labour and National Service for the purpose of the reference by him to the Industrial Disputes Tribunal of the question whether the employer concerned should be required to observe the agreed terms of employment. In proceedings for prohibition against the Minister and the union on the ground that there was no jurisdiction in the minister to refer, or in the tribunal to entertain the question referred, on the ground that it was a dispute between an employer and a single employee:—

Held, that the question whether an employer should be required to observe the agreed terms of employment was not a "dispute" within the meaning of art. (1) of the Industrial Disputes Order, 1951, but an "issue" under art. (2) and that the fact that the matter originated between an employer and one employee only did not deprive the Minister and the tribunal respectively of the power to refer and decide the question whether the employer should be required to observe the agreed terms of employment.

Rex v. *National Arbitration Tribunal; Ex parte South Shields Corporation* [1952] 1 K.B. 45 distinguished.

APPLICATION for order of prohibition.

At the material time the applicants, Practical Banking Ld., were the proprietors of a weekly newspaper, the Muswell Hill Record, which circulated in the district of Muswell Hill, Middlesex. A woman member on the editorial staff of the paper, who was a member of the National Union of Journalists, was in receipt of a weekly salary of £8 2s. 6d. In June, 1951, the Newspaper Society, of which body the applicants were not a member, representing the proprietors of a number of newspapers, and the National Union of Journalists, on behalf of its members, entered into a new salaries agreement applicable to journalists employed by weekly newspapers within a 12-mile radius of Charing Cross, under which the applicants' employee in question would receive a salary of £9 5s. 0d. a week if the agreement was binding on the applicants, as owners of the Muswell Hill Record. The applicants refused to pay the increased salary, and on August 21, 1951, the National Institute of Journalists reported to the Minister of Labour and National Service that an issue under article 2 of the Industrial Disputes Order, 1951,[1] made by the Minister pursuant to powers conferred on him by regulation 58AA of the Defence (General) Regulations, 1939, existed between the National Union of Journalists and the applicants, such issue being whether the applicants should observe the terms and conditions of employment for the journalists concerned, negotiated between the union and the Newspaper Society. It is provided by regulation 58AA of the Defence (General) Regulations, 1939, that among other things the Minister shall have power to make provision "for requiring employers to observe such terms and "conditions of employment as may be determined in accordance

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[1] The Industrial Disputes Order, 1951, art. 2: "Where (*a*) in any "trade or industry or section of trade "or industry in any district terms "and conditions of employment are "established which have been settled "by machinery of negotiation or "arbitration to which the parties are "organizations of employers and "trade unions representative respec-"tively of substantial proportions of "the employers and workers engaged "in that trade or industry or section "of trade or industry in that district "(hereinafter referred to as 'recog-"'nized terms and conditions'); and "(*b*) an issue as to whether an em-"ployer in that district should observe "the recognized terms and conditions "(hereinafter referred to as 'an "'issue') is reported to the Minister "in accordance with this order by an "organization of employers or a trade "union; and (*c*) the Minister is of "opinion that the organization of "employers or trade union reporting "the issue habitually takes part in "the settlement of terms and condi-"tions of employment in the trade "or industry or section of trade or "industry concerned; that issue shall "be dealt with in accordance with "the subsequent provisions of this "order."

"with the order to be, or to be not less favourable than, the "recognized terms and conditions."

On November 19, 1951, the Minister, pursuant to the powers conferred on him by article (9) of the order, referred the issue to the Industrial Disputes Tribunal. The applicants thereupon applied for an order of prohibition directed to the Industrial Disputes Tribunal and the National Institute of Journalists prohibiting them from further proceeding in the arbitration or settlement of the issue on the grounds (1) that the issue arose out of a dispute between the applicants and their employee as to the salary payable to her; (2) that the Minister had no power under the Industrial Disputes Order, 1951, to refer to the tribunal an issue arising out of a dispute between an employer and one employee; and (3) that the tribunal had no jurisdiction under the order to determine any such dispute.

David Renton for the applicants. An order of prohibition should be granted in this case since it is submitted that the decision in *Rex* v. *National Arbitration Tribunal; Ex parte South Shields Corporation* [2] conclusively shows that the Industrial Disputes Tribunal has no jurisdiction under the order to entertain a reference unless there is a "dispute" between an employer and more than one workman, and in the present case the "dispute" related to the pay of one employee only. By treating the question in the present case as an "issue" under article (2) of the order and not a "dispute" under article (1) the Minister and the National Union of Journalists have endeavoured to circumvent the decision in the *South Shields* case.[2] It is submitted that article (2) must be read in the light of the interpretation placed on the order by Lord Goddard C.J. in the *South Shields* case.[2] He there said: "The order of 1951 is in our view intended "to cover disputes which affect either all the workmen in the "service of an employer, or a particular section of workmen "in his employment," and he goes on to say that the words "employer" and "workmen" were to be interpreted literally, and that the Interpretation Act, 1889, had no application. There is no definition of an "issue" to be found either in article (2) of the order, in regulation 58AA, or in the Industrial Courts Act, 1919. In the present case it is necessary to look at the substance rather than at the form of the proceedings, and it is submitted that they are a "dispute" as to the wages to be paid to one employee which it has been held that the tribunal has no jurisdiction to hear.

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[2] [1952] 1 K.B. 46.

S. B. R. Cooke for the Industrial Disputes Tribunal, and *H. P. Stirling* for the National Union of Journalists, were not called on to argue.

LORD GODDARD C.J. The question in this case turns on the construction of the Industrial Disputes Order, 1951, and it is said that the matter is concluded in favour of the applicants by the decision of this court in *Rex* v. *National Arbitration Tribunal; Ex parte South Shields Corporation*,[2] but, in my opinion, when that case and the nature of the present reference are understood, it is clear that the decision has no application.

The Industrial Disputes Order, 1951, is an order made under regulation 58AA of the Defence Regulations, which gave the Minister of Labour power by order to make provision, among other things, "for requiring employers to observe such terms "and conditions of employment as may be determined in accord"ance with the order to be, or to be not less favourable than, "the recognized terms and conditions."

Turning to the order one finds that in Part I, which is headed "Report of disputes and issues," article (1) makes provision for the reporting of a trade dispute. Article (2) deals with the reporting of issues concerning recognized terms and conditions of employment; and the interpretation article provides that "issue" has the meaning assigned to it in article (2). That is not a happy way of defining the word "issue" because although it is possible by looking at article (2) to find what its purpose may be, there is no definition of issue.

It would be convenient first to see how the question in the present case arose. It appears from the affidavits that there was an employee on the editorial staff of the applicants' newspaper who is a member of the National Union of Journalists. On July 10, 1951, the organizer of the National Union of Journalists wrote to the editor of the Muswell Hill Record saying: "I am "informed that my members employed in your office have not "been paid the increased rate of wages and cost of living bonus "agreed between this union and the Newspaper Society. It "occurs to me that there might be some misunderstanding, and "I shall be obliged if you will take steps to have the necessary "adjustments made." On July 13 that letter was answered:

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[2] [1952] 1 K.B. 46.

" Thank you for your letter of July 10 and for its courteous tone. " There does seem to be some misunderstanding, for the Muswell " Hill Record is not a member of the Newspaper Society."

That seems to me to raise at once an issue under the order because I think that the only true inference one can draw from those letters is that the National Union are saying: " You, the " Muswell Hill Record, must abide by the terms and conditions " of employment that have been negotiated between the National " Union of Journalists and the Newspaper Society," and the editor of the Muswell Hill Record replies: " We are not going " to recognize the rates of wages which prevail by reason of any " agreement between the two organizations because we are not " a member of either of them."

I have already quoted the relevant clause from regulation 58AA which is concerned with employers. The regulation is not concerned with employers who are members of organizations, but is with requiring employers to observe " such terms and conditions " of employment as may be determined in accordance with the " order to be, or to be not less favourable than, the recognized " terms and conditions." In other words, if an employer is employing people on terms other than those to which the regulation refers as the recognized terms and conditions, then it seems that the regulations apply.

Then article (2) of the Order of 1951 provides: [His Lordship read article (2) and continued:] The object of that provision, as it seems to me, is to enable the terms which have been negotiated between representatives of a substantial proportion of employers and workmen to be imposed upon other employers and workmen, whether they are members of negotiating bodies or not. Presumably if they were members of negotiating bodies, whether trade unions or associations of employers, the members of those associations and the members of those unions would agree to abide by the terms that had been agreed between the parties. Obviously article (2) is intended to provide for cases where employers are holding out conditions of employment or workmen are being employed on conditions which are different from those negotiated, and which it was intended should apply to the trade as a whole.

Here, as I have pointed out, the dispute arises because the applicants say: " The terms and conditions which were agreed " between the employers' organization and the trade union are " nothing to do with us because we are not members of the "employers' organization." Then the trade union say to the Minister: "Please refer this matter to the tribunal so that the "tribunal may consider and, if they think fit, impose upon the "applicants, the employer in question, the terms and conditions "which have been negotiated in the trade between the representatives of the masters and men." Of course, that is a strong order to make, since it is an interference with the freedom of contract, but that is what the order is intended to achieve, and it is not for this court to consider whether it is desirable or whether it is not. We have only to construe the order.

Mr. Renton attempted to apply the decision of this court in the *South Shields* case,[2] to which I have already referred, to the present case, but in effect that case is quite different. In the first place it was there sought to refer the question which had arisen as a trade dispute and not as an issue under article 2 of the order. The issue in the case before us is whether the employer should observe the recognized terms and conditions. In the *South Shields* case [2] what had happened was that after a conference and long negotiations between the Association of Local Government Authorities and the Association of Local Government Employees—the two organizations concerned—a document had been prepared setting out the scales of pay which it was considered would be fair to various grades of municipal and local government employees. The negotiating bodies had not made that scale binding; all they did was to recommend its adoption, and the South Shields Corporation refused to adopt the recommendation. They said that their town clerk was already being paid what they considered to be an adequate salary, and they refused to pay any more. The town clerk then applied to the Minister and obtained a reference by him to the tribunal to consider whether or not he was entitled to have his contract varied by providing that he should be repaid the increased scale which had been suggested by these two negotiating bodies. Had it not been that the order under which that dispute had been originally referred had been repealed and in the repeal it had been provided expressly that this new Industrial Disputes Order should apply to any pending cases, our decision would have been different from what it was. We gave a decision on the interpretation of the Industrial Disputes Order, 1951; there is no doubt about that, and our decision in that case was that on a question of wages, where a man was saying he was entitled to be paid a particular wage, that question could not be referred to the Industrial Disputes Tribunal because the order contemplated the tribunal dealing with rates of wages common to the trade in general and did not deal with an individual case.

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[2] [1952] 1 K.B. 46.

In that case it may well be—I can quite well see the force of Mr. Renton's argument—that what has really brought up this question is the fact that it was alleged by the National Union of Journalists that the applicants' employee was being paid less than the recognized rate of wages, but this is not a reference by the employee, nor is it a reference with regard to that employee's wages, although they may be said incidentally to come into the matter. What is in question here is whether or not the Industrial Disputes Tribunal think fit to impose on the applicants the terms and conditions of employment which have been agreed between the Newspaper Society and the National Union of Journalists; that is the whole point.

That being so, it seems to me that the reference by the Minister falls exactly within the provisions of article 2 of this order and consequently that there is no ground for prohibiting the Industrial Disputes Tribunal from proceeding with the reference.

JONES J. I agree.

PARKER J. I agree.

Application refused.

Solicitors: *Slaughter & May; Solicitor, Ministry of Labour and National Service; Vizard, Oldham, Crowder & Cash.*

P. B. D.

1952
May 27.

Lord Goddard C.J., Hilbery and Devlin JJ.

LEICESTER *v.* PEARSON.

Road Traffic—Traffic regulation—Uncontrolled pedestrian crossing—Precedence to be given to foot-passenger by driver of vehicle—Failure to accord precedence—Absence of negligence on part of driver—Offence not committed—Pedestrian Crossings (London) Regulations, 1951 (*S.I.* 1951, *No.* 1193, *reg.* 4).

The provision in regulation 4 of the Pedestrian Crossings (London) Regulations, 1951, that "every foot-passenger on the "carriageway within the limits of an uncontrolled crossing shall "have precedence over any vehicle and the driver of the vehicle "shall accord such precedence to the foot-"passenger is on the carriageway within those limits before the "vehicle or any part thereof has come on to the carriageway "within those limits," does not impose an absolute obligation on a driver to accord precedence, but must be read subject to the qualification that the driver is to use reasonable endeavours in the particular circumstances to accord the necessary precedence, and if through his failure to do so an accident occurs on a crossing, a finding that there has been no negligence on the part of the driver will afford a complete defence to a charge under the regulation.

CASE STATED by a metropolitan magistrate.

An information was preferred against the defendant, Francis Vernon Pearson, charging him that in the County of London he being the driver of a vehicle approaching a crossing where traffic was not for the time being controlled by a police constable or light signals unlawfully failed to accord precedence to a foot-passenger who was on the carriageway at the crossing, contrary to regulation 4 of the Pedestrian Crossings (London) Regulations, 1951.[1]

At the hearing it was proved or admitted that on November 9, 1951, there was an uncontrolled pedestrian crossing—popularly known as a zebra crossing—complying with the provisions of the order, in Holloway Road, in the County of London. The lighting in the neighbourhood of the crossing was poor, it was raining, and the road surface was in poor condition. At about 5.30 p.m. a woman, pushing an empty perambulator, and accompanied by her child, aged two, started to cross the pedestrian crossing from the east side. That side of the road was flanked by trees which cast shadows on the road. On the west side, to which the pedestrian was crossing, light showed through the windows of shops. While the pedestrian was within the limits of the crossing, the defendant, driving a motor-car at a reasonable and proper speed in the prevailing circumstances, approached the crossing from the south. The defendant did not see the pedestrian till she was on the crown of the road although there was no physical obstruction which prevented him from seeing either the woman or the crossing. When the defendant saw her he was seven or eight yards from the crossing. He applied his brakes and the car skidded and collided with the perambulator, thereby causing the child to be knocked over.

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[1] Pedestrian Crossings (London) Regulations, 1951, reg. 4: "Every "foot-passenger on the carriageway "within the limits of an uncontrolled "crossing shall have precedence "within those limits over any vehicle "and the driver of the vehicle shall "accord such precedence to the foot-"passenger, if the foot-passenger is "on the carriageway within those "limits before the vehicle or any part "thereof has come on to the carriage-"way within those limits."

The magistrate was of opinion that the defendant was exercising all due care, was keeping a proper look-out, and was driving without negligence. He also found that the defendant failed to give the foot-passenger precedence at the crossing, but that it was not the defendant's fault that he did not do so. He accordingly dismissed the information.

The prosecutor appealed.

Maxwell Turner for the prosecutor.

J. Stocker for the defendant.

LORD GODDARD C.J. I will ask Devlin J. to deliver the first judgment.

DEVLIN J. This case raises a very short point of construction of regulation 4 of the Pedestrian Crossings (London) Regulations, 1951.

[His Lordship read the regulation, stated the facts as found by the magistrate, and continued:] It is not quite clear from the case whether the magistrate thought that the accident was due to the respondent having failed to see the foot passenger in time and therefore having started to pull up too late, or whether he thought that it was due to the fact that, seeing her in time and starting to pull up in time, as the result of the skid the collision occurred. But the fundamental finding is that there was no negligence on the part of the respondent and accordingly, before it is necessary to consider which of the two views mentioned above was operating in the magistrate's mind, it is relevant first to determine whether the finding of no negligence is by itself an answer. That depends on the construction of regulation 4.

The regulation appears in terms to be absolute; it says that every foot-passenger shall have precedence within the limits stated and that the driver of the vehicle shall accord such precedence to the foot-passenger. But there are plenty of precedents for saying that words which are expressly absolute in a statute or a statutory regulation can be construed as imposing only a qualified obligation if the context so requires. Statutes and regulations of this kind have in the past not uncommonly been held to mean "shall use reasonable endeavours." If one reflects on the consequences of imposing an absolute obligation, those consequences tend, in my judgment, to show that it would not have been the intention of the regulation. It would mean, for example, that although the respondent had done everything that he could be required to do, including keeping a proper lookout and actually seeing the pedestrian in good time, nevertheless, because he skidded he committed a breach of the regulation. Similarly, as it was put in the course of the argument, if, having pulled up himself, he were pushed forward by a car which bumped into him from behind and pushed him into collision with the person on the pedestrian crossing—a matter which would be quite beyond his control—he would still be liable.

In my opinion, the predominating consideration is this: regulation 4 is not one which is prohibiting particular kinds of driving; it is not saying that a person shall not drive in a particular way or at more than such-and-such a speed, or anything of that kind, a type of provision which has often been construed as imposing an absolute obligation; it is a regulation for controlling the order of traffic and for saying who is to have precedence at certain points. So regarded, I think that it would be quite unreasonable to suppose that an absolute prohibition or an absolute obligation would be intended by saying to a driver: "You shall let so-and-so go first," or, "You shall accord so-and-so precedence." Unless very clear and express words are used for that purpose, such a provision would not mean that the driver must give precedence whatever happened. It would mean that the driver must take reasonable steps to let the pedestrian have precedence, to let him go first, and that is what I think this regulation means.

Accordingly, I think that the finding of the magistrate that there was no negligence is conclusive that there was no breach of the regulation. Of course, that does not mean that it would be a defence in every case for a motorist to say: "I did not see the pedestrian"; far from it. The duty is to accord precedence; to give way to the pedestrian if he is on the carriageway within the prescribed limits before the vehicle or any part thereof has come on to the carriageway within those limits; and it would only, I imagine, be in an exceptional case that the magistrate would be able to find that a failure to see a foot-passenger in those circumstances was not due to some failure on the part of the driver to keep a proper lookout.

For these reasons I would dismiss the appeal and hold that the magistrate's conclusion was the right one.

HILBERY J. I concur. This regulation is not one which prohibits the doing of some specific act. It is a regulation which imposes a duty to do something on the happening of a certain event; and it is, therefore, just such a regulation, as the Lord Chief Justice pointed out in *Harding* v. *Price*,[2] as requires one, in construing it, to introduce some qualifying words and to construe it as though those qualifying words were written into the regulation.

The magistrate here, by specific findings of fact, has said that there was no negligence, that the driving was at a reasonable and proper speed, that the respondent was exercising all due care, was keeping a proper lookout, and was driving without negligence, which means that he did not fail to see this person on the crossing at the time when he ought to have seen her through any fault of his. The finding means that the respondent was not driving at a speed improper in the circumstances, and part of the circumstances was that the road was wet. The magistrate came to the conclusion that there was a failure effectively to accord precedence, because there was in fact a physical impact. But having regard to his findings of fact and to the clearance he gives to the respondent in respect of any allegation that he brought about the impact through any negligence, it seems to me that he is saying, in effect, that notwithstanding that the respondent did everything that a man could reasonably be expected to do, there was a failure to give an effective right of precedence to the foot-passenger, that is to say, that what happened was inevitable or was due to some circumstance over which the driver had no reasonable or possible control and that he was, therefore, not liable, which in our view is the way in which the regulation must be construed.

LORD GODDARD C.J. I agree. I am conscious that the decision which we have given may cause the police difficulties in administering the regulation, but I think that it would be impossible to construe it as imposing an absolute liability in the sense that come what may, and be the reason what it may, if an accident occurs, an offence has been committed. I agree, therefore with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *The Solicitor for the Metropolitan Police; Ponsford & Devenish.*

P. B. D.

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[2] [1948] 1 K.B. 695.

GROUNSELL *v.* CUTHELL AND LINLEY.

1952 *May* 23.

Ormerod J.

[1952, G. 1157.]

Practice and Procedure—Pleadings—Summons to set aside writ—Defective indorsement—Defect cured by statement of claim delivered before hearing of summons—Facts existing at time when summons is heard relevant to decide whether or not service of writ shall stand —Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 3.

On February 12, 1951, the husband of the plaintiff died as the result of an accident. On January 22, 1952, the plaintiff issued a writ, the indorsement of which stated that her claim was for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, arising out of the death of her husband (naming him) due to the negligence of the defendants. The writ, though thus issued within 12 months of the death as required by the latter Acts, was not served on the defendants until after that period had expired, namely, on April 23, 1952.

The second defendant entered a conditional appearance and issued a summons to have the service of the writ set aside, on the ground that the indorsement was defective for insufficient particularity of the claim.

After the issue of that summons but before it was heard, the plaintiff delivered a statement of claim which admittedly cured the defect.

When the summons was heard before the master, he refused to set aside the service of the writ, because the defective indorsement had been rectified by the plaintiff's delivery of the statement of claim.

On appeal from this decision to the judge in chambers:—

Held, that the circumstances to be considered on the application were those existing not when the summons was issued, but when it was heard; and as at that time the defective indorsement had been rectified, the service of the writ should stand.

Semble. If in the circumstances of the case the court had to exercise its discretion whether or not to allow the service of the writ to remain, it would do so in favour of the plaintiff, as this did not appear to be a case where, as a result of the exercise of the discretion, the defendant might be deprived of a defence.

Hill v. *Luton Corporation* [1951] 2 K.B. 387 applied.

Appeal from a master to the judge in chambers, who delivered judgment in open court.

On February 12, 1951, Kenneth Harry Grounsell died as the result of an accident on the same day. On January 22, 1952,

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[Reported by Miss M. M. Hill, Barrister-at-Law] the plaintiff, Rhoda Alice Grounsell, widow of the deceased, issued a writ in an action for damages in respect of his death. The indorsement of the writ stated that "The plaintiff's claim "is for damages under the Law Reform (Miscellaneous Provi"sions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, "arising out of the death of the late Kenneth Harry Grounsell, "due to the negligence of the defendants."

The writ was thus issued within the period of 12 months from the accrual of the right of action as required by the Fatal Accidents Act, 1846, s. 3,[1] but it was not served until April 23, 1952, that is, after that period had expired, but within the period of 12 months in which the writ could be served after its issue on January 22, 1952.

The second defendant, Raymond P. Linley, at once entered a conditional appearance to the writ, and issued a summons for an order setting aside the service of the writ on the ground that the indorsement was defective for want of sufficient precision in stating the cause of action against the defendants.

After the issue of the summons, but before it was heard, the plaintiff delivered her statement of claim, which admittedly set out in sufficient terms the cause of action. On the hearing of the summons the master refused to set aside the service of the writ, as any defect in the indorsement had been rectified by the delivery of the statement of claim, which the plaintiff was entitled to deliver as a matter of right without an order from the court.

The second defendant appealed to the judge in chambers.

The case was argued in chambers, but a reserved judgment was given in open court.

The arguments are stated in the judgment.

J. C. Leonard for the second defendant.

J. R. Cumming-Bruce for the plaintiff.

ORMEROD J. stated the facts as set out above and continued:— The defendant appealed to the judge in chambers, and submitted that the writ should be set aside for these reasons: (a) that it was admittedly defective, and the defect had not been made good at the time the summons was issued; (b) that the order setting aside the service of the writ should be made or not made according to the facts as they existed at the time when the summons was issued and not at the time when it actually came on for hearing; (c) that if an order was made refusing to set aside the service of the writ at the date of the hearing it could only be done by the exercise of the discretion of the court; and (d) that the court should not exercise that discretion in a case of this kind, where the time for the issue of the writ had expired, on the ground that to do so might deprive the defendants of a defence. In support of this the cases of *Marshall* v. *London Passenger Transport Board* [2] and *Batting* v. *London Passenger Transport Board* [3] were referred to.

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[1] The Fatal Accidents Act, 1846, s. 3: "Provided always, and be it "enacted. That . . . every such "action shall be commenced within "twelve calendar months after the "death of such deceased person."

The plaintiff contended that she had the right without recourse to the court to deliver a statement of claim; that she was not asking the court for any privilege or concession or for any exercise of discretion; that the facts on which the order should be made or not made were the facts as they existed at the time of the hearing of the summons; and that in those circumstances, following the decision of Devlin J. in *Hill* v. *Luton Corporation*,[4] the defect in the writ had been made good by the delivery of the statement of claim, and that there was no ground for setting it aside.

The matter was considered by Devlin J. in *Hill* v. *Luton Corporation* [4] as recently as 1951. The facts in that case were different from this case in one respect only, and that is, that although the writ was defective in almost exactly the same way as the writ in this case, there was delivered with the writ at the time of service a statement of claim, and Devlin J. held that the delivery of the statement of claim cured any defect in the writ; that the plaintiff had a right to deliver the statement of claim with the writ; that in those circumstances the defendant knew within the prescribed time of limitation what he had to meet in the way of a charge of negligence; and that it was immaterial whether he knew it from one document, the writ, or from two documents, the writ and the statement of claim.

The matter was considered by Devlin J. exhaustively, and I have no hesitation in adopting his reasoning. But he did expressly leave open the question of what should happen if the application to set aside were made before the delivery of the statement of claim; and as I see the question here, it resolves itself into a very short point. The plaintiff delivered a statement of claim, and by delivering that statement of claim she did in fact deliver particulars which were sufficient to acquaint the defendant with the charge which he had to meet, and by doing so (provided that she did it in time) cured any defect which there was in the writ or in the indorsement of the writ because of insufficiency of particulars or lack of precision in the way in which the writ was drafted.

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[2] [1936] 3 All E.R. 83.

[3] [1941] 1 All E.R. 228.

[4] [1951] 2 K.B. 387.

The only question here is whether this matter should have been considered by the court on the facts as they existed at the time when the summons was issued or as they existed at the time when the summons came to be heard. No authority was cited to support the contention of either side, and I myself have not been able to find any authority which deals with the matter in any sufficient or conclusive way. I have, however, come to the conclusion that the time when this matter should be considered is at the actual hearing of the summons, and that the facts to be taken into account in deciding the summons are the facts as they actually existed at that time. There is no question that at that time the statement of claim had been delivered—delivered, not as a result of an order but as a matter of right—by the plaintiff, which did sufficiently cure any defect that there was in the indorsement. That being so, I have come to the conclusion that this appeal should be dismissed and that the service of the writ should not be set aside.

If I am wrong in this, the question would arise whether or not this was a case where the court should, or might, exercise its discretion in favour of the plaintiff and still allow the service of the writ to remain. The class of case referred to by Devlin J. in his judgment in *Hill* v. *Luton Corporation* [4] is a class of case where the plaintiff was in the first place seeking the aid of the court, and where the court had determined that it would not grant that aid if to do so would deprive the defendants of a defence otherwise open to them. It is argued in the present case that if the discretion of the court is exercised in favour of the plaintiff and the writ is not set aside, the defendants would thereby be deprived of a probable defence to the action. I am not satisfied that that is so. Counsel for the appellant did not argue the question as to what might happen supposing the service of this writ were set aside; but I find it difficult to understand why, if it were, the plaintiff should not be able to re-serve the writ and to cure any defect in the indorsement by delivering

[4] [1951] 2 K.B. 387.

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a statement of claim at the same time as she served the writ. There is no question here of that not being possible because of time. Time had not expired, for there were still available several months in which to serve the writ.

In these circumstances, although the matter is not entirely without doubt, I should feel, if I had come to a different conclusion as to the time when the circumstances should be taken into account, that this was a case where the discretion of the court could properly be exercised in favour of the plaintiff, because this does not appear to me to be one of those cases where, as a result of the exercise of that discretion, the defendant might be deprived of a defence in the action.

Appeal dismissed.
Leave to appeal granted.

Solicitors: *Peacock & Goddard, for Browne, Jacobson & Hallam, Nottingham; Redpath, Marshall & Holdsworth, for J. Steele Carr, Sheffield.*

CHIBBETT (INSPECTOR OF TAXES) v. HAROLD BROOKFIELD & SON LD. (IN LIQUIDATION).

C. A.

1952
May 19, 20.

Evershed M.R., Birkett and Romer L.JJ.

Revenue—Income Tax—Sale of houses—Advances by building society to purchasers—Advances in excess of usual amount—Deposits by vendor company as collateral securities—Time when deposits to be taken into account for income tax purposes—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

A building company erected 130 small houses on land which they had bought and sold them before September, 1939; and as a building society made advances to the purchasers on mortgage in excess of sums usually lent to such purchasers on the security of their respective houses, the company from time to time deposited sums with the society as collateral securities for the advances. The value of sums so deposited were excluded from the company's profits for the years when the deposits were made. The deposits were made under the terms of charges executed in consideration of the advances to the purchasers. It was a term of the charges that the security thereby created was to cease when the society received all money secured by the mortgages.

On November 28, 1946, a winding-up resolution of the company was passed. Shortly before then an official of the society informed the company that if they applied for repayment of the total amount deposited with interest payment would be made, but no such application was made until the liquidator of the company asked for payment on December 20, 1946, and payment was made accordingly on May 8, 1947. The question had arisen whether this amount could be included in computing the profits of the company before the winding-up for the purpose of an assessment to tax under Sch. D of the Income Tax Act, 1918:—

Held, that, in view of the offer to repay before the winding-up resolution, showing that the money was available and ready for payment on the company's asking for it, there was the equivalent of a release, with the result that this sum was assessable to tax under Sch. D as being part of the company's trading profits.

John Cronk & Sons Ld. v. *Harrison* [1937] A.C. 185 cannot be taken as intended to lay down a comprehensive and exhaustive rule in such cases that, in the absence of a valuation of the sum deposited for income tax purposes when first deposited, it was only when an actual release took place that the actual cash repayment could be brought into account.

This view was assisted by *Absalom* v. *Talbot* [1944] A.C. 204 and *Gardner Mountain and D'Ambrumenil* v. *Inland Revenue Commissioners* (1947) 29 Tax Cas. 69.

Decision of Donovan J. reversed.

APPEAL by the Crown from a decision of Donovan J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the commissioners held on March 31, 1950, Harold Brookfield & Son Ld. (in liquidation), hereafter called the company, appealed against additional assessments to income tax made under Sch. D of the Income Tax Act, 1918, in respect of profits as builders.

The only question raised on the present appeal relates to the treatment of certain deposits with a building society. The company was incorporated on February 1, 1933, as a company with 1,000 shares of £1 each with a name which was altered on February 9, 1938, to the present name. The objects of the company were the acquisition, development and disposal of land and the carrying on of the business of builders and contractors. On November 28, 1946, a special resolution was passed for the winding up of the company.

In 1934 the company had purchased some seven acres of land in Longmoor Lane, Liverpool, and developed it by laying out roads and sewers and erecting some 130 small houses on part of the land. All these houses and much of this land had been sold before September, 1939. In connexion with these sales the company from time to time deposited sums of money with the Halifax Building Society as collateral security for advances by the society to the purchasers. The moneys so deposited were excluded from the computation of the profits of the company for the years when the sales of the houses took place in accordance with the decision in *John Cronk & Sons Ld.* v. *Harrison.*[1]

At the commencement of the winding up an asset of the company was the right to repayment of the moneys deposited with the society. The material facts as to these deposits were as follows:—

(1) Sums amounting to £3,729 were deposited by the company with the society between July 26, 1934, and May 24, 1939, under the terms of charges executed by the company in consideration of the society advancing upon mortgage to the respective purchasers of the houses in question sums in excess of those which the society would normally advance upon the security of such houses. All these charges were in similar terms and clauses 8 and 10 were as follows:—

"8. No application for the release of the charge hereby created "shall be considered until and unless the principal amount owing "on each of the guaranteed mortgages is reduced to at least 66⅔ "per cent. of the original valuation and any such release shall "be at the discretion of the directors of the society for the time "being and to their being satisfied with each security after a "revaluation by the society's surveyor. . . .

"10. The security hereby created shall be purely personal to "the society and shall not be transferred on any transfer of the "moneys secured by any of the guaranteed mortgages and shall "cease when the society shall have received all moneys secured "by the guaranteed mortgages respectively."

No evidence was given before the commissioners to show whether or not at the date of liquidation the condition of clause 8 had been satisfied, but it was common ground that clause 10 had not been satisfied.

(2) The sum of £3,729, together with £1,344 3s. 6d. for accumulated interest (less income tax), was paid by the society to the liquidator of the company on May 8, 1947, in pursuance of the liquidator's request made on December 20, 1946.

(3) Before the commencement of the liquidation no request had been made to the society by the company for repayment of any part of the sum of £3,729, but in July, 1946, the Liverpool district manager of the society had verbally informed the company that the society was unwilling to continue paying interest on the sum of £3,729 at the present rate, but that if the company applied

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[1] [1937] A.C. 185; 20 Tax Cas. 612.

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for repayment, this sum, together with all accumulated interest, would be paid. A similar statement was made in November, 1946, but nothing further was done, either by the company or the society, until the liquidator applied for repayment on December 20, 1946.

It was contended on behalf of the company that the moneys deposited with the society, and released subsequently to November 28, 1946, could not be included in computing the profits of the company for the purpose of any assessments made on it under Sch. D. But it was contended on behalf of the Inspector (1) that the liquidator continued to carry on the company's trade and was carrying it on when the moneys deposited with the society were released to the liquidator; (2) alternatively, that the reason for the decision in *John Cronk & Sons Ld.* v. *Harrison*[1] that the deposits should be brought to charge in the years of their receipt was that in that case no valuation was possible at any earlier date; and the fact that it was not a general rule was shown by *Absalom* v. *Talbot*,[2] where no such provision was made; (3) that therefore the said deposits ought to be brought into computation for the purpose of Sch. D assessments as soon as a valuation could be placed on them; that if the commissioners could place a value earlier than July, 1946, they ought to do so; but, if not, the deposits were in July, 1946, worth their full value, and should accordingly be brought into computation for 1946–47.

The commissioners gave their decisions as follows: (1) the trade of the company ceased on November 28, 1946, the date of the winding-up resolution; (2) on the question whether any amount should be included in the assessment to income tax in respect of the deposits with the society, it was not contended by either party that there was any material distinction between these deposits and those in *John Cronk & Sons Ld.* v. *Harrison*,[3] and the final order in that case was to the effect that the deposits should be valued when first made, but that in the event of a valuation being impracticable they "should not be treated as "receipts of the company's trade except in so far as such sums "or any part thereof were released to the company during the "trading period." Here the deposits were not valued when first made and only released after the winding-up order was made and after, therefore, the date when the company's trade ceased.

It was, however, contended on behalf of the Crown that although it may have been impracticable to value the deposits when they were first made, it was possible to value them in 1946 before the liquidation, that they were then worth their full face value, and that such value should be treated as a trading receipt of the company for the period prior to liquidation, despite the fact that they had not at that time been released. The commissioners found on that argument that although the company was not entitled to demand the release of the deposits in November, 1946, they were then worth their full face value having regard to all the evidence and to the rate of interest they carried. They were unable, however, to accept the Crown's contention that they should be brought into account as trading receipts before the liquidation. They could not find any justification for departing from the method of treatment indicated in *Cronk's* case,[3] that is, that the deposits, if not valued and brought into account when first made, should be brought into account when they were released.

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[1] [1937] A.C. 185; 20 Tax Cas. 612.

[2] [1944] A.C. 204; 26 Tax Cas. 16.

[3] [1937] A.C. 185.

Donovan J. dismissed an appeal from this decision, holding that the view expressed by the House of Lords in *John Cronk & Sons Ld.* v. *Harrison* [3] that, if the deposit in that case could not be valued at the time it was made, it could only be brought into account as a profit when it was released. This provided a code of treatment of the deposits in this case so that they could only have been brought in as a profit under Sch. D in the year they were released, which was in this case too late as the company was then no longer trading. The Crown appealed.

J. Millard Tucker Q.C. and *Sir Reginald Hills* for the Crown.
Graham-Dixon Q.C. and *Lionel A. Smith* for the company.

EVERSHED M.R. This appeal relates to the question of the taxability of sums deposited by the respondent, Harold Brookfield & Son Ld. (referred to as the company), in the course of their business with the Halifax Building Society. I think it clear that the question which the appeal raises depends on the real effect of the speeches in the House of Lords in *John Cronk & Sons Ld.* v. *Harrison*,[4] and particularly on the form of order which the House made in that case. [His Lordship stated the facts in the present case.]

In the *Cronk* case [4] the transaction, as I have so far described it, corresponded with the transaction which was there under review by the courts. In the course of that case an illustration was given of figures which it may be convenient for me to mention because it will illustrate and make clear perhaps any deficiency in my exposition of the matter. The illustration was that of a house the purchase price of which was £625. Of that sum £35 was paid by the purchaser on the purchase and the whole of the rest was advanced. But of the sum which thus was advanced (£590) £31 13s. 4d. was left with or deposited with the building society, so that the builder in fact received two sums, £35 from the purchaser and £558 6s. 8d. from the building society, and the builder guaranteed to the building society a proportion of the sum of £558 6s. 8d. so left outstanding. It was part of the arrangement that, when the buyer had paid off a sufficient amount of the outstanding purchase price, the builder was entitled to have released to him the sum deposited, in the case I have given by way of illustration of £31 13s. 4d.

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[3] [1937] A.C. 185.

[4] [1937] A.C. 185.

The present case is further complicated in the respect that, instead of having a series of separate individual transactions each relating to a particular house and a particular purchase, there was a composite arrangement made, the brief effect of which was that the total sums deposited in respect of a considerable number of houses together constituted, in the hands of the building society, security for the guarantees which the builder had to enter into in regard to all these houses. Whether in every respect the deed of February 12, 1937, gave effect to the scheme which I have attempted to outline is not entirely clear to me in certain respects, but beyond doubt I have said that which was intended to represent the business of the matter. So far as the right of the builder to recover the sum deposited is concerned, that is dealt with in clauses 8 and 10 of the deed. [His Lordship read these clauses.] I should add, in addition to the provisions I have stated, that in this case the amount deposited carried interest at the rate, after deduction of tax, equal to, I think, 2½ per cent.

It is apparent that the arrangement which I have referred to in the present case, whereby all the various deposits were so to say lumped together, was more advantageous and gave better security to the building society than a series of wholly independent and individual charges. From what I have read, it is also clear that before the builder could demand as of right to have this security, that is to say the deposit, released, the conditions would have to be such that, strictly speaking, all the individual buyers should have paid to the society an amount of the purchase-money under their several purchases equivalent to the total (in respect of each purchase) guaranteed by the builder. At all material times in this case that situation does not appear to have arisen—at least, there is no evidence that it had arisen, and the inference is, and I read the finding of the Special Commissioners as indicating, that no such right to claim repayment of the deposits had ever arisen.

The significance of the present case has arisen from the fact that on November 28, 1946, a special resolution was passed by the company for voluntary liquidation. The Special Commissioners have held—and there is no complaint about the finding—that thereafter the company must be treated as having ceased to carry on business. At that date, in fact, the sums deposited, with which we are concerned and which amounted with accrued interest to a sum of over £5,000, had not in fact been repaid. The claim of the company in this case has been that, as a consequence of the decision in *Cronk's* case,[4] sums so deposited or their value are not liable to be brought into account for tax purposes until or except to the extent to which they are repaid unless—and this does not arise in the present case—at the time when the transaction was originally entered into a proper valuation could be arrived at of the value to the builder of the sums deposited.

The claim of the Crown rests on the circumstance that although no part of the deposited sum and interest of £5,000 had been repaid before the liquidation, nevertheless, from July, 1946, onwards, the building society had made it plain that the total amount was there for the builders' asking if they wanted to have it. That arose no doubt from the fact that the building society was paying under this contract of charge a high rate of interest, and I take it that there had been sufficient paid by the purchasers to make it worth the while of the building society, if they could, to get rid of their obligation to pay this relatively high rate of interest. The relevant finding is towards the end of the case and is in the following terms: "Although the company were not "entitled to demand the release of the deposits in November, "1946"—that must mean, as I have already said, the conditions had not arisen which entitled them to demand by virtue of clause 10 to have the security discharged—"we find, having "regard to all the evidence and to the rate of interest they "carried, that they"—that is the deposits—"were then worth "their full face value." In the light of the evidence, which included evidence of the fact that the representatives of the building society had offered to repay, as soon as the builder asked for it, the sums deposited with interest, I take that to mean that the money was there, as I have said already, for the builders' asking.

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[4] [1937] A.C. 185.

The Special Commissioners, however, say that they felt precluded by the effect of *Cronk's* case [4] from deciding that the value of these deposits could be brought into the trading account before liquidation, with the result that, on that view, they were not liable to be brought into any account attracting tax. In order to determine the one point which I have formulated as to the effect of *Cronk's* case,[4] it will, I think, be necessary to spend a little time in looking at the argument put forward on behalf of the Crown and the taxpayer respectively in *Cronk's* case,[4] and then to see precisely what the House of Lords decided. I think it is not open to question that, in the ordinary case of a trader who is selling goods of any kind, or, as in this case, selling houses which he builds, he is assessed for purposes of taxation in respect not of the actual cash received but of earnings. If, therefore, such a trader sells goods, prima facie he will be required to bring into his account for tax purposes the purchase price, even though the price has not been paid in fact. I say prima facie, because I do not want to be understood as laying down some general rule which goes far beyond the requirements of this case or to comprehend transactions where the purchase price is by the terms of the contract payable only upon some future and possibly distant date. But, in the ordinary case, where the buyer has become bound to pay but has not paid the amount of the book debt, that is a credit brought into account, subject only to a proper allowance being made for bad and doubtful debts.

The two views of *Cronk's* case [4] may be put thus. Did it really decide no more than that, in the peculiar circumstances which are involved in these building society deposits, practical considerations prevented the sums deposited (subject to the charge and the other obligations attached to it) from being effectively brought into account, at any rate in nine cases out of ten, at the date they came into existence? and did it therefore follow that the ordinary rule must be modified so far as necessary in order to pay due regard to that practical circumstance? Or did that case go the length of saying that in this class of debt and in this class of case a special, comprehensive and exhaustive rule was laid down which may briefly be put thus, that unless

[4] [1937] A.C. 185.

when the deposit debt is first created it can be given a proper value, it is not valued at any stage thereafter but treated purely on a cash basis? For my own part I am not entirely clear, if a valuation is fixed in the first instance, what subsequently happens; but that, I think, does not matter. My own conclusion is that of those alternatives the former is the correct one and that the House of Lords did not intend to lay down such a comprehensive and exhaustive rule as would make a striking exception to the general principle and indeed would almost amount to a piece of special, albeit judicial, legislation.

I turn accordingly to the *Cronk* case [4] to see what it decided. I think I have stated the facts which were relevant and the nature of the case. From the statement of the case it appears that the respective contentions which came before the commissioners and the courts were these. It was said on behalf of the company that in computation for income tax purposes of the profits of the company for two specific years ending January 31, 1931 and 1932, sums deposited by the company with the building society ought not to be treated as receipts of the company's trade except in so far as such deposited sums were released to the company during those years. There was then an alternative contention that, if the first was not right, the deposits should be brought into account at figures not exceeding their actual present value as assets of the company's trade; or, if the deposits were brought into account at their nominal amount, deductions should be allowed in respect of the differences between such nominal amounts and the actual present value of the deposits as assets. Against that argument, the contention of the Crown was that the full nominal amounts of the deposits (being in effect part of the purchase-money for the houses sold) should be brought into account as receipts of the trade and that any losses under the guarantees should be allowed at the time when they occurred. Those were the respective contentions.

In the Court of Appeal a decision was reached by Lord Hanworth M.R. and Romer and Maugham L.JJ. that the right view was to adopt the alternative contention of the appellant taxpayer and to bring in the so-called assets not at face or nominal value but at their actual value. I would like to refer to two sentences of Maugham L.J.'s judgment in *Cronk's* case,[5] to which my brother Romer referred during the argument: "I think one "has to consider whether there have been profits or gains in these

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[4] [1937] A.C. 185.

[5] 20 Tax Cas. 612, 632.

"cases by the tests applied in ordinary business, and, in my "opinion, the appellants, Messrs. Cronk, would not, according "to ordinary business notions, be acting properly in regarding "themselves as having received the whole of the purchase-money "in a case where they never have received, and never could "receive, the whole of the purchase-money except subject to the "chance of a number of small instalments being paid monthly "by people of the sort who enter into these transactions, and "who are able only to pay the small monthly instalments out of "their wages."

There was an appeal to the House by the Crown. The first significant thing to note is that the appeal was dismissed. That leads me strongly to suppose that the House was not seeking to lay down what I have called a special or exhaustive rule, but was adopting the view that you had to apply, so far as practical matters enabled you to do so, the ordinary business rule. Only one speech was delivered, and that was by Lord Thankerton. The other noble Lords, Lord Roche, Lord Atkin, Lord Macmillan and Lord Russell of Killowen, all concurred with Lord Thankerton. I propose to read two paragraphs from Lord Thankerton's speech. After saying that the view of the commissioners and of Finlay J. that deposits should be brought in at their face value did not commend itself to him, he proceeds[6]: "In my opinion, it would "be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of "the company, such sum to be applicable to reduction of the "advance made by the society to the purchaser, in the event "of the latter's default, any surplus going eventually to the "company. In other words, in the example referred to, the "true purchase price was not £625, but two sums of £35 and "£558 6s. 8d. payable at the time of the sale, with a further "addition of any balance eventually available from the deposit. "On the other hand, I am not prepared to say that the view "taken by the Court of Appeal is not a legitimate one, though "I should prefer my own view expressed above. The view of "the Court of Appeal, as I understand it, is that, at the time "of the sale, the company received, in addition to the £35 and "the cheque for £558 6s. 8d., an asset in the shape of a credit "in the books of the building society, on which interest was "payable to the company, but which was subject to a contingent "liability, which materially affected its value to the company;

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[6] [1937] A.C. 185, 193.

"that such asset should be valued as at the time of the com-"pletion of the sale, and that such value should be entered as "part of the price received for the house. It is unnecessary to "consider now whether such valuation will be subject to revision "or readjustment on its eventual realization. I am, therefore, "of opinion that the case of the Crown has not been made out "and that the appeal fails, and, in the absence of a cross-appeal, "the decision of the Court of Appeal will fall to be affirmed." So far, I venture to think, no difficulty arises. But the learned and noble Lord then continues: "But I have serious doubt as "to whether the valuation ordered by the Court of Appeal is "practicable in any proper sense; the commissioners, after "hearing evidence, have expressed the view that an actuarial "valuation is not possible, and it may well be that no proper "valuation is possible. I propose, therefore, that the order of "the Court of Appeal should be varied by adding that in the "event of the commissioners finding such valuation to be imprac-"ticable, the sums deposited with the building society under the "circumstances described in the case stated should not be treated "as receipts of the company's trade except in so far as such "sums, or any part thereof, were released to the company during "the trading periods in question." Be it noted that those last words are an echo of the first way in which the builders had put their case. Then the form of the order was as follows: "That "the order of the Court of Appeal be varied by adding that, in "the event of the commissioners finding an actuarial valuation "impracticable"—I think the word "actuarial" may possibly be a slip—"the sums deposited with the building society under "the circumstances described in the case should not be treated "as receipts of the company's trade except in so far as such "sums or any part thereof were released to the company during "the trading periods in question, and that subject to such "variation the said order be affirmed and the appeal dismissed "with costs." I should have stated (if I have not already made it clear) that the valuation which the Court of Appeal suggested, and the House said should be made if possible, was a valuation at the date of the original transaction of sale. That was the only valuation in contemplation, and from the nature of the contentions no other suggestion, no question of any valuation date after that time, ever came into the picture at all.

Having regard to the form of order, it is natural, I think, that

Mr. Graham-Dixon should say: Suppose in the *Cronk* case[7] that the Special Commissioners came to the conclusion, as we are all prepared to assume that they did, that no valuation was possible at the starting date, but that, at some later date, although there had been no release, there had been, as had occurred here, an offer which, if accepted, would make a good contract for good consideration to repay at once the sum deposited, would it be consistent with the order of the House of Lords in *Cronk's* case[7] to treat the amount of the deposit, which the society had said they were willing and anxious to repay, as an item to be brought into the trading account? Or must not any bringing into account of the subject-matter of this transaction be necessarily excluded until the actual cash was received? I am ready to concede to Mr. Graham-Dixon that, in the *Cronk* case,[7] having regard to the particular order made in that case, he may well be right, and that nothing but the actual cash receipts would attract tax. But that is simply, as I follow it, the effect of the order made for the purposes of that case. The passage in the speech of Lord Thankerton which I have read seems to me, as I understand it, not properly capable of laying down a rule of the exhaustive character suggested, not only for the *Cronk* case[7] but for every other similar case. I attach considerable importance to the use in his speech of the phrase "with a further addition "of any balance eventually available from the deposit."

I think two views may be taken. It is intelligible and legitimate to conclude that the peculiar obligations on the one side or the other which are entered into when a builder makes arrangements of this kind with a building society are such that you can at no stage postulate a "debt" due from the one to the other. The most you can say is that there is a bundle of mutual rights and obligations which, according to the happening of many events quite outside the control of both parties, may produce the result that either one party or the other in the end may have an asset, namely, a claim by the one against the other. I think that is the view which commended itself to Lord Porter, for both in his speech in the later case of *Absalom* v. *Talbot*[8] and also in *Gardner Mountain and D'Ambrumenil* v. *Inland Revenue Commissioners*,[9] I think Lord Porter expressed that inclination of his mind.

As the matter does turn upon a proper view of the extent of the decision in *Cronk's* case,[10] it is perhaps right, out of respect to the noble Lords, that I should make this one reference to Lord Porter's speech in the *Gardner Mountain* case.[11]

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[7] [1937] A.C. 185.

[8] [1944] A.C. 204; 26 Tax Cas. 166.

[9] (1947) 29 Tax Cas. 69.

After referring to *Cronk's* case [12] and the passage from Lord Thankerton's speech which I have already read, he says, speaking of that case: "The facts were peculiar. The material "parties were a building company," and so on. Then he gives an illustration which I need not repeat, and says: "In these "exceptional circumstances it may well be said that a new "relationship has been established between the society and the "company, under which, indeed, if it can be fairly estimated "that some sum is due to the latter by the former, the "remuneration is regarded as earned though its payment is "postponed, but if no estimate can be made the contract "between the parties must be regarded as leaving no debt due "on one side or the other but only a position in which there are "mutual obligations which may as well show a credit to the one "party as to the other. If I may be permitted to quote from "my own speech in *Absalom's* case [13]: 'In it' (i.e., *Cronk's* "case [14]) I say, 'no debt remained due from the purchaser to "'the owner. The full price was paid to the latter by the "'building society, but, lest the society should not be repaid by "'the purchaser in full, the owner deposited a sum of money "'with it and guaranteed payment of an additional sum beyond "'the deposit. In these circumstances there were contingent "'liabilities on each side—in the case of the society to return "'the deposit or some part of it, if the money which was "'recovered from the purchaser enabled this to be done; on "'the side of the owner to implement his guarantee if the "'purchaser failed to pay even so much as with the deposit "'made up the full price.' And again: 'In such a case there "'was no debt either present or future due to the appellant. "'It might eventually happen that something would be found "'to be due to him, but, on the other hand, so far from "'receiving, he might have to pay.'" If that view be the right view then, as it seems to me, it should follow that no question of any valuation either initially or at any other time would be appropriate. There would be nothing to value. There was no asset to value. In such a case the logical result might be to leave the matter entirely to be dealt with quoad income tax liability on a cash basis. But the view which Lord Porter entertained was not, I think, the view of the majority of the noble Lords either in *Absalom's* case[15] or in the case of *Gardner Mountain and D'Ambrumenil* v. *Inland Revenue Commissioners*.[16] It would be taking too much time if I were to refer at length to all the speeches, but I note what was said by Lord Simon L.C. of the *Gardner Mountain* case[16] and what is said on the following page by Lord Wright in expressing his concurrence with Lord Simon. There is a sentence or two also from the present Lord Chancellor's speech, Lord Simonds, which is worth quoting, because it was referred to by my brother Birkett. After referring to *Cronk's* case[17] Lord Simonds says: "On the contrary, the profits not having "been ascertained, the issue was whether certain sums, which "were admittedly subject to possible diminution, should be "brought into charge at their face value, as the Crown contended, "or, as the subject in the alternative successfully contended, "should be brought into charge at their then present value. It "was the latter view that prevailed in this House, though, in "consideration of the possibility that no valuation was possible, "the rider was added to the effect that in that event only such "sums should be treated as receipts of the periods in question as "were actually received."

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[10] [1937] A.C. 185.
[11] 29 Tax Cas. 106.
[12] [1937] A.C. 185.
[13] [1944] A.C. 204, 225.
[14] [1937] A.C. 185.

I have left to the last the reference which must be made to the *Absalom* case.[18] The facts in that case were somewhat different. There was not a transaction between the builder and the building society, or not one which was relevant. In that case, what happened was that the sum required by the purchaser or so-called client, to enable him to buy a house, which was in excess of what the building society would advance, was charged by way of second mortgage or on the security of a promissory note entered into between the purchaser and the builder. That second charge, providing for the repayment of the excess sum advanced, was treated as part of the price made payable over a long period of time by various instalments. The question involved was, though the facts were different, an analogous question to that in *Cronk's* case,[19] namely, whether the sum which the purchaser was thus obliged to pay to the builders upon the security of the second charge or promissory note over a period of years should be brought into account at the time of the sale of the house at an estimated value, or at its full face value.

[15] [1944] A.C. 204.

[16] 177 L.T. 16, 29; 29 Tax Cas. 106, 111.

[17] [1937] A.C. 185.

[18] [1944] A.C. 204.

[19] [1937] A.C. 185.

The House decided in favour of the former view by a majority of three to two. *Cronk's* case [19] was not only carefully considered, but it is to be noted that, of the two Law Lords who were in the minority and who favoured in that case bringing in the sums at their full face value, Lord Porter was one. The majority, consisting of Lord Atkin and Lord Thankerton, who had been in *Cronk's* case,[19] and Lord Russell of Killowen, who had also been in *Cronk's* case,[19] favoured the conclusion that the sum should be brought in at its actual or estimated value. It is fair to say that, in considering the application of *Cronk's* case,[19] Lord Russell of Killowen, if left to himself, would have taken the view that transactions of this kind should always be brought into account for tax purposes purely on a cash basis. His view, therefore, would support Mr. Graham-Dixon's contention and is, indeed, fairly allied with Lord Porter's view. But both Lord Atkin and Lord Thankerton clearly preferred the other view of *Cronk's* case,[19] and Lord Russell of Killowen said that, in spite of his own inclination, he was not prepared to differ from what had fallen from Lord Atkin and Lord Thankerton, and, therefore, he formed with those two the majority of the House.

The matter was further complicated by a dissonance between the noble Lords as regards the correctness of a judgment in the Privy Council in the case known as the *Gleaner* case, *Gleaner Co. Ld.* v. *Assessment Committee of Jamaica.*[20] I think I need not take time over that matter, but I must read certain passages from the speech of Lord Atkin in *Absalom's* case.[21] After referring to the *Gleaner* case [22] Lord Atkin says: "There are "more methods than one of calculating the profit in such cases "as the present, and it may be that more than one may have "to be adopted. For my part, I think that the most satisfactory "course would be to put the debts at their face value on the one "side and to open a suspense account on the other side, which, "no doubt, would be calculated upon the ordinary risk of bad "debts, and adjust it year by year in accordance with the actual "payments made." Then he deals with the point raised in the *Gleaner* case [22] about rule 3 (i) applicable to Cases I and II of Sch. D. He proceeds: "Another method which is correct "enough in theory is to value the debt. It would thus be treated "as an asset received in part discharge of the price, and its "value would be calculated according to the experience of the

[19] [1937] A.C. 185.
[20] [1922] 2 A.C. 169.
[21] [1944] A.C. 204.
[22] [1922] 2 A.C. 169.

"business. . . . Another and more accurate method as long as "the business continues is that which I understand is preferred "by my noble and learned friend Lord Russell of Killowen, "which is to enter only in each year the instalments actually "paid or at any rate payable. The difficulty, as it appears to "me, is that when the creditor retires from business"—I interpolate, as has happened in this case—"according to present "accepted practice, income tax would no longer be chargeable "on instalments received after that date. I venture myself to "doubt whether this practice is correct; the proceeds would be "annual gains, and they would be due to carrying on a trade "though not in the year of assessment. It is difficult to see how "they would differ from instalments received in the second or "third year while business is still being carried on. I can express "no final opinion about this, for it has not been argued, but I "should like to consider it an open point. However, there is, "I think, no doubt about the practice, and I think therefore "that, as the case must go back to the commissioners, it will be "sufficient to leave it to them to settle the right method of "adjusting the assessment, feeling that the method of valuation "affords least scope for legal doubt, and that in default of "satisfactory valuation being possible, they may have to fall "back upon the method of taxing instalments in each year as "they fall due." I hope I have referred sufficiently to *Absalom's* case [23] to justify my conclusion that the majority of the noble Lords in that case—and I think the same is true of the *Gardner Mountain* case [24]—lend no support to the view that *Cronk's* case [25] lays down a principle which I will briefly describe as "taxing on cash received only."

Reverting, then, to what I have earlier said, I think it would be surprising, having regard to the circumstances in *Cronk's* case,[25] and the issues to be tried, and particularly to the form of judgment in the Court of Appeal, if the House in *Cronk's* case [25] were thought to have deliberately decided to do otherwise than apply the ordinary business methods, subject only to such qualifications as the practical circumstances of the case necessarily imposed. If the House had so decided, I cannot help thinking that they would not have dismissed the appeal but would, as a matter of principle and logic, have discarded the Court of Appeal's direction for any valuation being made or attempted and held, in accordance with Lord Porter's view and Lord Russell's indication, that there was never any asset capable of valuation, so that in every case and for all purposes deposits of this kind should only be brought into account for tax purposes upon a cash basis.

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[23] [1944] A.C. 204.

[24] 29 Tax Cas. 104.

[25] [1937] A.C. 185.

If that is a right summary of the matter, the conclusion in this case seems inevitable. It is perhaps, fortunately, not necessary for me to say whether, in view of the order of the House in *Cronk's* case,[25] it is right or proper to make a revaluation periodically or to attempt to do so. All we have to decide in this case is whether (if the situation is reached when the sums deposited are not in truth released but are as good as in the hands of the company, being theirs for the asking), the equivalent to a return of the money, as a matter of principle, of logic and of common sense, has, upon a strict view of *Cronk's* case,[25] involved the right to tax. Or, put in another way, whether these circumstances are not within the essential meaning of Lord Thankerton's speech in *Cronk's* case,[25] and particularly his phrase "with a further addition of any balance "eventually available from the deposit." I think they are, and I think that any other conclusion would be one which the court should only adopt if it were compelled to hold that a new, singular and, I think, artificial but exhaustive rule, applicable in these cases only, had been established by *Cronk's* case.[25]

I am bound to say, speaking with the utmost possible respect, that the language in the various speeches of the noble Lords in these cases has given some justification for the difficulties in the argument which has been put forward. If I have misinterpreted what the noble Lords intended to say, no doubt on some occasion they will correct my error and state, as perhaps they best can state, what precisely the decision in *Cronk's* case [25] in the House of Lords did mean and what it was intended to cover. In my view there was here an equivalent of a release. There was available in the ordinary sense the sums of money in question at a time when this company had not gone into liquidation and had not ceased business. I, therefore, think that the Crown's case is correct and ought to succeed.

I only add that it follows that I am unable to agree, with all respect, with the view of Donovan J., who thought that there was such a firm rule established, as the Special Commissioners also thought. There is one passage in his judgment that I would like to mention. After referring to *Cronk's* case,[25] he said: "It" that is, the decision and the construction of it which Lord Porter put upon it—" leaves no room for another alternative such as " this: Bring in the deposits as a profit for the one year in " which they can be valued. The only case I can think of which " might require different treatment is the case where deposits " are freely available for recovery, but for some reason the trader " deliberately refrains from collecting them." Although the learned judge says that is not found in this case, I think in substance that is indeed what happened in this case, and that is the one point we have to decide.

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[25] [1937] A.C. 185.

For the reasons I have attempted to give, I think this appeal ought to be allowed, and that the Crown is entitled to succeed.

Birkett L.J. I agree with the judgment of the Master of the Rolls. After the full exposition of the point at issue and the discussion in argument on both sides, it is plain that there is very little that can be added, and even that little must in some respects savour of repetition. One cannot sit in this court even for a few days without realizing that it would be a rash man who said of any point under the Income Tax Acts that it was a simple point. Certainly it would be unbecoming of me to say so. But I realize—and I add a few words for this express reason—that we are in fact differing from a judge who is most learned and experienced in income tax matters. It is with real diffidence and with real recognition of that fact that I add a few words.

Although the point could not be described as simple, its statement for the decision of the court can be put simply, as indeed has been done in the judgment to which we have just listened. The question to be determined—and this is really common ground between the Crown and the respondent company —is simply this: what is the proper method of computing this company's profits with regard to the deposits with the Halifax Building Society, the exact nature of which has been described in the judgment of the Master of the Rolls? What is the proper method of treatment? The argument for the company addressed to us by Mr. Graham-Dixon had this great virtue at any rate, that it came back time and time again to the simple point upon which he relied: " I am covered by authority. The highest " authority in the law, the House of Lords," he said, " has " decided this case in terms conclusively in my favour. There " is indeed no room for argument, once that decision is under" stood." It was stated in this way. The House of Lords in

Cronk's case,[25] according to Mr. Graham-Dixon, said in the plainest possible terms—and it applies to the facts here—that if possible the assets should be valued at the time of the transaction. But if not, if that is impossible or impracticable, then it must be brought into account when the money is paid. The actual words of Lord Thankerton were "that such asset should "be valued as at the time of the completion of the sale, and that "such value should be entered as part of the price received for "the house." Then, omitting a few words, he says: "I "propose, therefore, that the order of the Court of Appeal should "be varied by adding that in the event of the commissioners "finding such valuation to be impracticable, the sums deposited "with the building society under the circumstances described in "the case stated should not be treated as receipts of the "company's trade except in so far as such sums, or any part "thereof, were released to the company during the trading "periods in question." Mr. Graham-Dixon came back time and time again to the assertion that, whatever else was arguable in this case, this was quite plain and could not be disputed, that the company had never had the sums, and, therefore, if *Cronk's* case [25] meant what it says, this was a case which was evidently within it.

Mr. Millard Tucker and Sir Reginald Hills, for the Crown, contended that *Cronk's* case [25] is only decisive of the particular facts which were then under discussion. They were described in the later case of *Gardner Mountain & Co.*,[26] by Viscount Simon, as "special and complicated facts." They were referred to in the speech of Lord Porter as "the exceptional and peculiar "features" of *Cronk's* case.[27] The argument for the Crown was that *Cronk's* case [27] was to be confined to those special and exceptional facts to be found in that case, and they added that the decision in *Cronk's* case [27] certainly did not prevent a situation arising that, when it was made clear by evidence that the asset was wholly good, as it was contended in this case it was according to the statement of the Halifax Building Society, then, when valuation was possible, you should bring it into account. Upon that contention all the argument has proceeded. It is quite plain that the Special Commissioners took the view that Mr. Graham-Dixon has argued for in this court. They said, in the case stated: "It was, however, contended on behalf of

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[25] [1937] A.C. 185.

[26] 29 Tax Cas. 106.

[27] [1937] A.C. 185.

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CHIBBETT (INSPECTOR OF TAXES) *v.* HAROLD BROOKFIELD & SON LD. (IN LIQUIDATION).

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" the Crown that, although it may have been impracticable to " value the deposits when they were first made, it was nevertheless possible to value them in 1946 prior to the liquidation; " that they were then worth their full face value, and that such " value should be treated as the trading receipt of the company " for the period prior to liquidation, despite the fact that they " had not at that time been released. Although the company " were not entitled to demand the release of the deposits in " November, 1946, we find, having regard to all the evidence " . . . that they were then worth their full face value. We are, " however, unable to accept the Crown's contention that they " should be brought into account as trading receipts prior to " liquidation." Then here was the gist of the matter: " We " cannot find any justification for departing from the method of " treatment indicated in *Cronk's* case,[27] i.e., that the deposits, " if not valued and brought into account when first made, should " be brought into account when they are released." They were perfectly plain in saying: " We decide this case because *Cronk's* " case [27] covers it completely."

Donovan J., out of his learning and experience of these matters, came exactly to the same view, for, after reviewing the whole matter, he said this: " But a deposit released in the same " year as that in which it was made would never give rise to " any problem requiring legal consideration right up to the House " of Lords. It would be obvious that it had to be brought in for " that year, and the House of Lords cannot have thought they " were deciding only such a case. Nor can its order [28] reasonably " read in any such limited sense. In effect it says this: Value " the deposit, if you can, at the time when the house is sold. " If you cannot, bring the deposit in as a trade receipt when it " is ultimately released. That seems to have been Lord Porter's " view also of the decision (see *Absalom* v. *Talbot* [29]) and it " provides a complete code of treatment of these deposits while " the trade continues. It leaves no room for another alternative " such as this: Bring in the deposits as a profit for the one year " in which they can be valued." Then he goes on to deal with people who are deliberately refraining from collecting them which my Lord quoted. It is plain that Donovan J. said that this decision in *Cronk's* case [30] not only covered this particular case but it did not permit of any alternative view. Moreover, it laid down a complete code of conduct for cases of this kind. With

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[27] [1937] A.C. 185.

[28] 20 Tax Cas. 642.

[29] [1944] A.C. 204.

[30] [1937] A.C. 185.

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the greatest respect to the learned judge in the court below, I venture to take a different view.

I have listened to the arguments, I have considered the cases, and the question really for determination is this: Is the language used by Lord Thankerton in *Cronk's* case [30] such that it lays down some all-embracing principle for cases of this nature? Does it in truth lay down a code of conduct for cases of this kind, or is it only applicable to the special and complicated facts, the exceptional and peculiar features, of *Cronk's* case [30]? I think the second and not the first is the correct view. The argument has been fully analysed by the Master of the Rolls in the judgment to which we have listened, and I will not repeat it; but it does seem to me that, if it is to be said that this language of Lord Thankerton is laying down a complete code, I must say, with great respect to everybody, it is done in a very casual kind of way, almost as a postscript, almost as an afterthought; because it always must be remembered that the issue in *Cronk's* case [30] was really whether the debts or assets should be valued at their face value or at their estimated value. In the words of Lord Thankerton, the Court of Appeal unanimously held that the sums deposited with the building society should be brought in as trading receipts at the time of sale, not at their face value, but on a proper valuation. That was the issue—nominal value or actual value.

Mr. Graham-Dixon put the question rather rhetorically in argument this morning in this way: "Can it be supposed that "the House of Lords, when considering the question in *Cronk's* "case,[30] never considered the question which has been the "subject matter of debate here in the Court of Appeal yesterday "and today?" The only answer that I can make to that question is this: there is no record of any argument having been addressed to the House about it. It is perfectly true that, in the speech of Lord Thankerton and in the judgment of the House, there is no reference to it. In such a case, the issue being whether it is nominal face value or estimated actual value, it would seem to me that, if it had been intended to lay down that there is no intermediate stage between the time when the debt was incurred and the time of payment, which may be many years, and therefore to exclude any possibility of a valuation at any other period, the House of Lords would have said so. The answer to the question, "Can it be supposed that the question was not considered?" is, I think, with respect to everybody, "Yes, I can conceive that."

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[30] [1937] A.C. 185.

The issue that was being discussed was a very very important one —face value or actual value. Lord Thankerton says that the Court of Appeal decided this matter properly; they decided not face value, but on a proper valuation, and the House agreed with them. But then he said [31]: "I have serious doubts as to whether "the valuation ordered by the Court of Appeal is practicable. I "think the principle is right, but I doubt whether it is practicable. The commissioners are doubtful about it—they have "expressed their doubts about it. I propose, therefore, that the "order of the Court of Appeal which we think right in principle" —I am putting my own gloss upon this—"should be amended in "this way. If, when this matter comes before the commissioners, "they should still find it to be impracticable, then the deposits "should not be treated as receipts of the company's trade except "in so far as such sums or any part thereof were released to the "company during the trading period in question." As I have ventured to suggest, it is a doubt about its quality and nature, not precisely an afterthought but something superadded in this sense: "If you can do what we say, well, do it. But as you "have expressed a doubt on whether it is practicable so to do, "let us add these words. If you cannot do it, if valuation is out "of the question, why, then, wait till the money is paid."

For my part, I cannot think that these speeches or judgments in the House of Lords preclude the idea that you should value, if you arrive at a stage when you can do it, when there are no longer any practical difficulties—when they have all vanished or been resolved.

For these reasons, and for the reasons which have been stated by my Lord, I agree with the conclusions at which he has arrived.

ROMER L.J. I also agree. It is only because we are taking a different view of this matter from that which commended itself to Donovan J. that I propose to add a few words of my own. Neither the order in the *Cronk* case [32] nor anything that Lord Thankerton said in his speech in that case seem to me to present any obstacle to the conclusion which my Lord has expressed on this appeal. The Court of Appeal in *Cronk's* case [33] held that the sums deposited with the building society should be brought in as trading receipts at the time of each sale, not at their face value, but on a proper valuation, and remitted the case to the commissioners for determination of such values and the adjustment of the assessments. With regard to that, Lord Thankerton said that he had serious doubts as to whether the valuation ordered by the Court of Appeal was practicable in any proper sense. He said[34]: "The commissioners, after hearing evidence, "have expressed the view that an actuarial valuation is not "possible, and it may well be that no proper valuation is possible. "I propose, therefore, that the order of the Court of Appeal "should be varied by adding that, in the event of the commissioners finding such valuation to be impracticable, the sums "deposited with the building society under the circumstances "described in the case stated should not be treated as receipts "of the company's trade except in so far as such sums, or any "part thereof, were released to the company during the trading "periods in question." That language was substantially adopted in the order of the House varying the order of the Court of Appeal. The word "released," which was introduced into the order and used by Lord Thankerton, obviously means released by the building society. What Lord Thankerton had in mind, when he used that phrase "released to the company," can be seen from a passage in his speech, when he said[34]: "In my "opinion, it would be more correct to treat the retention of the "deposit as a retention of part of the nominal purchase price "with the consent of the company, such sum to be applicable "to reduction of the advance made by the society to the "purchaser in the event of the latter's default, any surplus going "eventually to the company. In other words, in the example "referred to, the true purchase price was not £625, but two sums "of £35 and £558 6s. 8d., payable at the time of the sale, with "a further addition of any balance eventually available from the "deposit." The word "applicable" which he uses in that passage is referable to the society's contractual right to retain the deposit and apply the sum in reduction of the advances made by the society to the purchaser in the event of the latter's default. Subject to the exercise of that right, the deposits were recognized as belonging to the company. On the happening of certain events the society would be bound to release the deposits from this right to apply them to the specified purposes, and the company would have a contractual right to payment. On this happening, and the company receiving the deposits, they would have to be treated as receipts in the company's hands. But exactly the same result would be arrived at if the society at any time offered to exonerate the deposits from the rights they had over them and hand them back to the company. If the offer were accepted the deposits would be released and made available to the company in the same way as if they were paid over by the society under their contractual obligations so to do. In the present case the building society wanted to repay these deposits because of the unfavourable rate of interest which they bore. If the builders had accepted the offer which the society had made to them in July, 1946, they would have acquired a contractual right to claim payment of the deposits, and that contractual right would be of equal effect and force as would have been their rights under clause 10 of the deed, if that clause had ever been brought into operation. In each case the deposits would be available to the builders free from the rights in relation to the deposits which had been vested in the society down to that time. In each case the "release" contemplated by Lord Thankerton would have been effected, and I can see no reason for distinguishing between a release which is brought about by virtue of clause 10 of the deed on the one hand, and a release resulting from an offer by the society to repay the amounts on the other. The latter is merely an acceleration by the society for their own purposes of the obligation imposed on them by clause 10 of the deed, and so far as the builders are concerned would lead to precisely the same results.

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[31] [1937] A.C. 185, 193.

[32] Ibid. 185.

[33] 20 Tax Cas. 612.

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[34] [1937] A.C. 185, 193.

Mr. Graham-Dixon sought to meet that by suggesting that the offer might have been withdrawn. Well, if it had been accepted it could not be withdrawn, because there would be consideration moving from the builders in this case in accepting it, which would have sustained the acceptance and converted the offer into a contract. But, be that as it may, the commissioners found as a fact that the deposits had their full value as a result of the offer having been made. That shows that they treated the position as though the deposits were actually laid upon the table, as it were, by the society, waiting only for the builders to pick them up and put them in their pocket.

Accordingly, I do not think that our decision is in any way inconsistent with the decision in *Cronk's* case,[35] and I accordingly, agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Potter, Sandford & Cosgrove, for W. T. Husband & Son, Liverpool.*

H. C. G.

[35] [1937] A.C. 185.

LATIMER *v.* A.E.C. LD.

[1951, L. 385.]

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Apr. 30;
May 1.

Singleton, Denning and Hodson L.JJ.

Factory—Master and servant—Floor—Maintenance—Flooding of factory floors by exceptional rainfall—Gangway slippery with mixture of water and escaped oil—Workman allowed to work there—No negligence—No breach of duty to maintain gangway—Meaning of "maintain"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (1).

During an unusually heavy rainstorm the floors of a factory were flooded and an oily cooling mixture, which normally was contained in a channel in the floor, along which it was pumped to machinery, rose and mixed with the flood waters. Consequently, when the flood subsided, the floors were slippery. As far as supplies permitted, sawdust was spread on the floor, but some areas were left untreated. A workman, working in a gangway which had not been treated with sawdust was attempting to load a heavy barrel on to a trolley when he slipped and injured his ankle. In an action against his employers:—

Held, first, that the employers had not been negligent for they had done all that a reasonable employer could be expected to do, bearing in mind the degree of risk involved due to the slippery floor. Secondly, that there was no breach of the statutory duty to "maintain" the floor of the gangway, as required by section 25 of the Factories Act, 1937. The floor was structurally sound, and could not be said to be not properly maintained because it was wet and oily. There was, further, no breach of section 26 for, although that section might apply to things on the floor as well as to the floor itself, the duty imposed by that section was to provide safe means of access so far as is reasonably practicable, and, in the circumstances of this case, the employers were excused.

APPEAL from Pilcher J.

The plaintiff, Albert Richard Latimer, was employed as a horizontal milling machine operator in the defendants' works at Southall. During the afternoon of August 31, 1950, virtually the whole of the defendants' premises became flooded with surface water as the result of an exceptionally heavy fall of rain at about midday, followed by the inability of the defendants' surface water drainage system and that of the local authority to carry away the unprecedented volume of water. The flood water backed up inside the factory and, as a result, an oily cooling agent known as mystic, which was pumped along a conduit in the floors, rose and mixed with the water and some of it escaped on to the floors of part of the factory. Consequently, when the flood waters receded in the course of the afternoon, parts of the factory floors

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were left more slippery than they would have been if, in their usual, probably, somewhat greasy state, they had been flooded only with water mixed with mud due to the backing up of the water in the drains.

At the material time the defendants had in their works some three tons of sawdust which they used to absorb the mess on the floors as soon as the water went down; but by 5 p.m. their supply of sawdust was exhausted and none was left to spread over considerable areas of floor space.

The plaintiff came on night shift that evening about 8 p.m. and a number of labourers were still busy mopping up and cleaning the factory when he arrived. At about 8.30 p.m. he left the general machine room in the course of his work, and went about 30 yards along a concrete surfaced gangway in order to fetch a new supply of components on which to work. The gangway along which he had to go was one which had been flooded with the mixture of water and mystic, and on which the defendants had not been able to spread sawdust as their supplies had run out. The components were kept in barrels weighing about two hundredweights each. While he was attempting to put a barrel on a truck to bring it back with him, he slipped; the barrel slipped too, caught his left ankle and seriously injured it.

He brought an action against the defendants claiming damages in respect of his injuries and alleging that the defendants were in breach of the statutory duties imposed on them by sections 25 (1) and 26 of the Factories Act, 1937,[1] and were negligent. The defendants denied liability.

Pilcher J. held that the defendants were not guilty of a breach of any of the statutory duties imposed by the Factories Act, 1937; but that, although they had done everything that they could reasonably be expected to do, short of shutting the factory, they were negligent in permitting the plaintiff to do his ordinary work in a part of the factory where the floor was slippery. Having thus taken the risk that he might sustain injury, they were liable for the injury which he had in fact suffered. The defendants appealed against that finding.

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[1] Factories Act, 1937, s. 25 (1): "All floors, steps, stairs, passages and "gangways shall be of sound construction and properly maintained."
S. 26 (1): "There shall, so far as is "reasonably practicable, be provided "and maintained safe means of access "to every place at which any person "has at any time to work."
S. 152: "'Maintained' means "maintained in an efficient state in "efficient working order and in good "repair."

Burton Q.C., *Everett Q.C.* and *Ripman* for the employers. The employers were not guilty of a breach of either a statutory or a common law duty towards the plaintiff in allowing him to work in the factory, although there may have been a slight risk in permitting him so to do. The test in deciding whether they were guilty of negligence at common law is whether a reasonable employer would have sent his employees home when he realized that the floor might be slippery and that he could not obviate the resulting risk. With regard to the existence of a risk, apparently, no one suggested that the floor was so dangerous that men should not work there, and, apparently, also the plaintiff's was the only injury which was caused by the slippery floor. Indeed, there is no evidence that the employers knew that the floor was still slippery when the night shift arrived. Pilcher J. thought this case was analogous to leaving a machine unguarded, but the risk of injury from the slippery floor was nothing like so great, and, further, while it is probably feasible to stop one machine working until a suitable guard can be obtained, it may be difficult to shut a part of a factory without dislocating the whole works. As in *Daborn* v. *Bath Tramways Motor Co. Ld.*,[2] it is necessary to balance the risk with the effect of taking the only effective remedy, in deciding what the hypothetical prudent employer would do. The economic effect of shutting the whole factory and sending the men home might be out of all proportion to the slight risk involved by a slippery floor, but there is no evidence by which those factors can be balanced, the one against the other. *Edwards* v. *National Coal Board*[3] is not irrelevant, but the test for the common law duty is not whether it was practicable to take steps, but whether the employer has taken reasonable care not to expose his workmen to unnecessary risk. There is always some risk of slipping in most occupations, and this was not unusually risky.

As the conditions of work were unprecedented, the question whether the employers had provided a safe system of work does not really arise. [Counsel referred to *Paris* v. *Stepney Borough Council*.[4]] Pilcher J. found that the defendants had done all that they could be expected to do, short of shutting the factory, and in absence of evidence as to the effect of closing down, and without any assessment of the degree of risk involved in staying open, the defendants have discharged their common law duty. Pilcher J. misdirected himself on this matter.

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[2] [1946] 2 All E.R. 333.

[3] [1949] 1 K.B. 704.

[4] [1951] A.C. 367.

Everett Q.C. following. No evidence was given as to the effect of shutting the factory because the suggestion that the factory ought to have been shut came from the judge himself after the evidence had been completed. [Counsel referred to *Speed* v. *Thomas Swift & Co. Ld.*[5]] The common law duty was to take reasonable care, and what was reasonable care depended on the circumstances. Pilcher J. here applied the wrong principle when he said that the employer ought to have closed down if he could not obviate the risk of slipping in any other way. The right test is whether, in all the circumstances, there was anything further that he ought to have done.

Jukes for the plaintiff workman. The employers were negligent towards the plaintiff because, having regard to the type of work he was doing, there was a risk of serious injury to him resulting from the wet and slippery condition of the floor. There was a breach of the common law duty of an employer to provide safe premises for employees. As to the question whether the factory ought to have been shut, the plaintiff established to the satisfaction of the judge that the area of the floor where the plaintiff was doing heavy work was unsafe; the defendants admitted the risk of slipping but said that they had done the best they could do but they could not make the premises safe that night. Pilcher J. then found, as he was entitled to do, without needing further evidence, that the factory ought to have been closed and the men sent home, for it was clear from *Wilsons and Clyde Coal Co. Ld.* v. *English*[6] that if an employer is unable to make the premises safe, he should not allow his workmen to work there. If the defendants wished to show that, in the circumstances of the case, there were overriding considerations which made it impossible to close the factory, the onus was on them to prove that. It may be that the risk to workmen walking along the gallery was slight, but the plaintiff was moving heavy barrels and the chances of his slipping were considerable. It would probably have been perfectly easy to have stopped this particularly risky operation without dislocation of the factory and, certainly, without shutting down the whole factory, and the defendants did not attempt to prove the contrary. Pilcher J., after hearing all the evidence, has applied the right test in arriving at his finding as to whether there was a breach of the common law duty, and it should be upheld.

Further, there was a breach of the statutory duty imposed on employers by sections 25 (1) and 26 (1) of the Factories Act, 1937, to " maintain " the floor. That means more than keeping the floor itself in good repair; it extends also to keeping the surface of the floor in good condition. A latent defect is no excuse for failure to observe that duty: see *Galashiels Gas Co. Ld.* v. *O'Donnell or Millar* [7]; and I submit that, although the flooding was unprecedented, that also did not absolve the defendants. The duty imposed by section 25 applies also to things put on the surface of a floor which may result in the floor not being maintained in a good and efficient condition, having regard to the work being done on it. The observations of Somervell L.J. in *Davies* v. *De Havilland Aircraft Co. Ld.*[8] do not apply to these facts. Further, Somervell L.J. applied the test of practicability, but the House of Lords in *Galashiels Gas Co. Ld.* v. *O'Donnell or Millar* [9] said that was not relevant for the purposes of section 25, though it would be under section 26. The test was whether the thing on the floor made it unsuitable for the purpose for which it was being used. An oily floor cannot be said to be properly maintained and efficient, although it may be, as this floor admittedly was, structurally sound.

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[5] [1943] 1 K.B. 557, 570.

[6] [1938] A.C. 57.

SINGLETON L.J. [after stating the facts and the conclusion reached by the trial judge, continued]:—I take two passages from the judgment of Pilcher J.: " I am satisfied that at about 7.45 " p.m., when the plaintiff came on duty with the other members " of the night shift, the defendants' responsible officers knew, or " must be taken to have known, that many areas of floor surface " upon which the night shift would be required to work were, or " might be, slippery by reason of the film of oil left upon them by " the solution of mystic. It is equally clear, upon the evidence, " that the plaintiff himself had the same knowledge. . . . The " third point taken on behalf of the plaintiff was more formidable, " namely, that the defendants had failed in their common law " duty to exercise reasonable care to make their premises safe for " the plaintiff, who was their servant. As I have already said, " I am satisfied on the facts that the plaintiff sustained the " injuries in respect of which he claims because his foot slipped " on the concrete surface of the floor where he was working. His " foot slipped because the surface was wet and oily. I am further " satisfied, for the reasons which I have given, that the concrete

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[7] [1949] A.C. 275.

[8] [1951] 1 K.B. 50.

[9] [1949] A.C. 275.

"surface in question became wet and oily through no fault of the "defendants and that the defendants could not, in the particular "circumstances, by the exercise of reasonable care, have dried "and cleaned the oil off all the working floor space and had no "particular reason to select the area of floor upon which the "plaintiff slipped for special attention. Both the defendants' "responsible officers and the plaintiff knew that such portions of "the floor of these extensive premises as had not been cleaned "with sawdust were in varying degrees wet, oily and slippery, "and thus potentially dangerous to men working upon them."

Pilcher J. then proceeded to state the trouble which the defendants had taken in order to put the floor into as good a condition as possible, and continued: "Whilst Mr. Jukes, on behalf of the "plaintiff, did not accept that the defendants had exercised all "reasonable care in the respects which I have found, he submitted "that, even on the facts as I have found them, the defendants "could not escape liability to the plaintiff, who was their servant, "inasmuch as they had permitted him to work in premises which "they knew to be potentially dangerous. He contended, with "some force, that in such a state of affairs the defendants should, "immediately it became apparent to them that the premises were "potentially dangerous in the fashion I have described and that "they could not be rendered safe for some time, have sent the "night shift, including the plaintiff, home, allowing only such "men as were prepared to volunteer to carry on with cleaning up "to enter the premises."

The suggestion that the factory should be closed was made by Pilcher J. after the evidence had been closed and during Mr. Everett's address to him. It may be, as Mr. Everett said, that since the plaintiff's case did not seem very strong upon the particulars he had delivered, Mr. Jukes accepted the case as put to him by Pilcher J., and Mr. Jukes submitted in this court that the judge's decision on that ground ought to be accepted.

Pilcher J. continued: "In support of his argument Mr. Jukes "submitted that the situation which faced the defendants on the "evening in question was no different from that which faces any "employer who permits his servant to use a machine which is, "to his knowledge, potentially dangerous due to a defect which no "care and skill on his part can remedy until, let it be supposed, "a spare part not immediately available is procured and fitted. "In such a case it is clear that the employer will be liable if "he causes or permits the servant to use the machine and the "servant is injured by an accident due to its known defective "condition. It is difficult to see why the same situation should "not obtain in regard to employers' premises which are in a "dangerous condition."

With all respect to Pilcher J., I think that there is a difference. If a machine is dangerous, it may be the duty of the employer to say: "Do not touch that machine, or do not work on it, until it "has been put in order; it is not safe." On the other hand, if by reason of something for which the employers are not responsible, parts of the floor of their factory have become slippery, and they are unable to remove all slipperiness before the night shift men arrive, the position is not precisely the same as it is in the case of a dangerous machine. I cannot see that, in such circumstances, it is the duty of the employers to say: "No one must "work in the factory until all the floor has removed from it the "character of slipperiness which it got through the flood." It must be a question of degree, and various matters have to be considered.

Pilcher J. continued: "As soon as the employer is made aware "that his premises are potentially dangerous and that such "dangerous condition cannot be immediately remedied by care "and skill on his part, a proper regard for the safety of servants "who would normally work in such dangerous premises would "seem to require that some action should be taken by him. If "the only course open to the employer, consistent with due regard "to his servants' safety, is to shut his premises, then I am satisfied "that he is not entitled to escape liability for a servant who is "injured by the dangerous condition of the premises by saying: "'These premises were rendered dangerous through no fault of "'mine. I knew they were dangerous, but at the time you were "'injured the danger could not have been removed by any care "'and skill on my part.'"

I agree that if an employer's premises were rendered dangerous by fire and there was a risk of the roof falling, or a risk of a wall collapsing on the workmen, it might well be the duty of the employer to say, "No man must work in this factory until steps "have been taken to secure the portions which have been endangered by fire," and to make sure that the men did not run unnecessary risks. I think the position is different when all that has happened to the premises is that the floor is slippery.

Towards the end of his judgment Pilcher J. said: "I have

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"only to consider whether I am satisfied that the defendants "acted with due regard to the safety of the plaintiff when they "permitted him to work in premises which they knew to be "potentially dangerous through no fault of their own. I am not "so satisfied, and I think that in all the circumstances of the case "the defendants, in permitting the plaintiff to do his ordinary "work in a part of the factory where the floor was slippery and "therefore dangerous, took the risk that he might sustain an "injury, and are thus liable for the injury which the plaintiff in "fact sustained owing to the dangerous condition of the premises. "No doubt they were faced with a difficult situation, and I do "not shrink from the conclusion that the defendants' duty in the "particular circumstances, if they desired to escape liability for "accidents due to the slippery condition of the floor, may have "been to send away all men who were not prepared to volunteer "for cleaning work—and when I use the word 'volunteer,' I "mean volunteer on such terms as would enable the defendants "to rely, in the case of accident, upon the defence of volenti non "fit injuria. I, therefore, conclude that the defendants are liable "to the plaintiff in respect of the accident which occurred and "the consequent injuries which he sustained."

It seems to me that Pilcher J. put on the defendants a higher duty than employers owe to their workmen at common law. The duty of the employer is to act reasonably towards his men; to take care, in the way that a prudent employer would, to see that his workmen are not exposed to unnecessary risks. That obligation extends to the building in which they work, to the plant, and, in some cases at least, it covers the providing of a proper system of work.

On the facts of the present case, the defendants had done all they could to put the factory into a proper condition. Pilcher J. so found, but he found also that, in the circumstances, the employers were at fault because they had permitted the plaintiff and other men to work on the premises on the night shift on August 31.

Mr. Jukes on behalf of the plaintiff submitted that it was not necessary to say that men should not have been allowed to work in any part of the premises; it might have been sufficient to say that this particular part should not be used by men because the floor was slippery. The difficulty I feel about the case as found by Pilcher J. is that it was not pleaded, and that no question was asked which would support a finding that the employers were negligent in not closing down their works. If the position was such that consideration ought to have been given to a general closing down, it would have thrown out of work a great number of people on the night shift. There is no evidence to show how many people were employed at night, but the total number of employees at this factory was 4,000. The factory occupies 15 acres. The court was not told how many men worked at night, but if, for example, it had been said at 6 o'clock that evening, "There is going to be no night shift," and if all those people who were ready to work that night had been thrown out of work, it would have raised some difficulties. No question was asked as to the nature of the work which was being done in this factory, or in this particular part of the factory; there is nothing to show whether it was work of national importance, as it may have been; not a single question was asked to show what it would have meant to close down this factory, or some part of this factory. Indeed, the question of closing down the factory was not mentioned until all the evidence had been given. In those circumstances, I do not think that the finding that the defendants were negligent and had committed a breach of the duty which they owed to the plaintiff by reason of the fact that they did not close down the premises, can stand. There was no complaint by a shop steward or by any workman and, apparently, there was no complaint from anyone at any time; nor is there any evidence to show that any other workman slipped. It seems that the only man who slipped that night was the plaintiff, and, most unfortunately, he fractured his ankle; so that the finding that the defendants were negligent in not closing down the whole of their factory is, apparently, unsupported by evidence.

If the test is, as I believe, what would a reasonable employer have done in those circumstances, I fail to see that the employers committed any breach of the duty which they owed, and I fail to see, too, any evidence on which to base a finding that the employers were negligent in not closing down.

Mr. Jukes, on behalf of the workman, submitted that the workman should be held entitled to maintain the judgment of Pilcher J. on the ground that there was a breach of the statutory duty laid down or required by section 25 (1) of the Factories Act, 1937. [His Lordship read the subsection and continued:] Mr. Jukes said that the place at which the plaintiff slipped was part of the floor or a gangway, and he directed attention to the definition of the word "maintained" in section 152 of the Act. [His

Lordship read the definition.] Mr. Jukes said that the floor was not properly maintained by reason of the fact that it was in some parts slippery.

Pilcher J. took an opposite view, and in his judgment he said: "I am satisfied that this argument cannot succeed. The marginal "note to section 25 is 'Construction and maintenance of floors, "'passages and stairs.' The words 'construction' and 'main- "'tenance' are in apposition and I am satisfied that, in its "context, the natural meaning of the word 'maintained' is "'maintained in a good state of repair,' and it is not suggested "that the floor on which the plaintiff slipped was in any way "uneven or out of repair." Pilcher J. referred to the definition of the word "maintained" in section 152 and continued: "Whilst "the words 'in an efficient state' and 'in efficient working "'order' are more appropriate to machines than to floors, I am "satisfied that the floor of the gangway in question, which was "level and structurally perfect, had been properly 'maintained' "within the meaning of this word in section 25 (1), although at "the material time its surface was wet and oily."

Those words of Pilcher J. seem to me to be in accord with that which was said by Somervell L.J. when sitting as an additional judge of the King's Bench Division in the case of *Davies* v. *De Havilland Aircraft Co. Ld.*, where the Lord Justice said[10]: "Assuming a slippery patch of water or an unexplained patch of "oil, I do not think that it would come within those words. The "fact that, for an uncertain period and in circumstances which "no one can explain, there was a patch of oil on the floor, does "not amount to a breach of the duty of maintaining. Equally, "on the assumption that there was a slight depression in the "concrete, where, after rain, there was a patch of water which "made the surface slippery, there has been no breach of that "subsection. It would be impracticable so to maintain passages, "roads and pathways that there was never a slippery place where, "especially after rain, a workman might slip. Slipping is quite "a common incident of life, and mostly no harm is done by it, "although unfortunately this plaintiff did suffer serious injury."

Respectfully, I agree. I do not think that the plaintiff can succeed under section 25 of the Factories Act, 1937. For these reasons, I am satisfied that the appeal of the defendants must succeed, and that judgment should be entered for the defendants.

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[10] [1951] 1 K.B. 50, 52.

I would like to add this. Pilcher J. took great trouble in this case, and his findings of fact are set out most admirably, so that it has been unnecessary for the learned counsel to refer us to much, or any, of the evidence in any detail.

DENNING L.J. I agree, particularly with what my Lord has just said about the quality of the judgment of Pilcher J., but it seems to me that he has fallen into error by assuming it would be sufficient to constitute negligence that there was a foreseeable risk which the defendants could have avoided by some measure or other, however extreme. That is not the law. It is always necessary to consider what measures the defendant ought to have taken, and to say whether they could reasonably be expected of him. In a converse case, for example, a brave man tries to stop a runaway horse. It is a known risk and a serious risk, but no one would suggest that he could reasonably be expected to stand idly by. It is not negligence on his part to run the risk. So here the employers knew that the floor was slippery and that there was some risk in letting the men work on it; but, still, they could not reasonably be expected to shut down the whole works and send all the men home. In every case of foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it. It is only negligence if, on balance, the defendant did something which he ought not to have done, or omitted to do something which he ought to have done. In this case, in the circumstances of this torrential flood, it is quite clear the defendants did everything they could reasonably be expected to do. It would be quite unreasonable, it seems to me, to expect them to send all the men home. I agree, therefore, that there was no negligence at common law.

In considering section 25 (1) of the Factories Act, 1937, it is necessary to distinguish between the floor itself, and things on it, be they solids or liquids. So far as the soundness of the floor itself is concerned, the duty is absolute. Even a latent defect, which could not have been discovered by reasonable care on the part of anyone, may constitute a breach of section 25: *Galashiels Gas Co. Ld.* v. *O'Donnell or Millar.*[11] But section 25 (1) does not apply to things on the floor. The duty in regard to them is either at common law to take reasonable care, or, in some circumstances, under section 26 of the Act, to do what is reasonably practicable. There is not much difference between section 26 and the common law, so far as master and servant are concerned, but there may be a good deal of difference so far as invitors and invitees are concerned.

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[11] [1949] A.C. 275.

In this case there was nothing wrong with the floor itself, and, therefore, there was no breach of section 25. There was no negligence at common law and no breach of statutory duty. I agree, therefore, that the appeal should be allowed.

HODSON L.J. I agree.

Appeal allowed.

Solicitors: *Carpenters; Rowley, Ashworth & Co.*

E. D.

1952
Apr. 2, 3;
May 1, 2, 28.

Sellers J.

DU JARDIN *v.* BEADMAN BROS. LD.

[1951 D. No. 1841.]

Sale of goods—Motor-car—Possession of motor-car obtained by fraud—Sale to innocent third party—False pretences—Larceny by a trick—"Consent" of the original owner—Title of innocent purchaser—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 25—*Factors Act,* 1889 (52 *&* 53 *Vict. c.* 45), *ss.* 2, 9.

G. agreed to buy a Standard motor-car from the defendants; he gave a cheque in payment and left a Hillman motor-car as security for the cheque. The defendants, knowing that G. was going to show the Standard car to a prospective customer, handed him the registration book and a receipt and let him drive the car away. Subsequently, without the defendants' knowledge, G. surreptitiously removed the Hillman car. Three days later G. sold the Standard car to the plaintiff who received it in good faith and with no knowledge of any defect in G.'s title or authority to sell and deliver it to him. The cheque given by G. to the defendants was worthless; G. was convicted by a jury of fraud in the transaction and the Standard car was returned to the defendants. In an action in which the plaintiff sought to recover the Standard car from the defendants who denied that the car had at any material time belonged to the plaintiff:—

Held, that there is no reason to interpret the word "consent" in section 2 and section 9 of the Factors Act, 1889, in such a way as to bring it into harmony with the criminal law and that, therefore, the operation of the Act is not prevented by the fact that an agent or buyer is guilty of larceny by a trick any more than by the fact that he is guilty of larceny as a bailee but in each case the inquiry is whether possession of the goods was obtained with the consent of the original owner or seller and it is his knowledge and intention which have to be assessed. Accordingly, G. having obtained possession of the car with the consent of the defendants, the plaintiff obtained a good title under section 9 of the Factors Act.

Pearson v. *Rose and Young Ld.* [1951] 1 K.B. 275 applied.

Action.

On May 12, 1951 the Saturday before Whit Monday, one Greenaway called at the defendants' garage and negotiated to buy for £710 a Standard motor-car belonging to the defendants and then in their showrooms. He said that he wanted to take the car away at once to show to a prospective buyer and offered a cheque for £710; this the defendants refused. Greenaway then offered to pay £10 at once and to leave a black Hillman Minx motor-car in which he had arrived at the defendants' premises as security against a cheque for £700 so that he might have immediate delivery of the car. The defendants assented to this and said that the Standard car was not to be sold until the cheque had been cleared, and that if the cheque was cleared by the bank on the following Tuesday they would release the Hillman car. Greenaway made a cash payment of £10, and gave a cheque for £700. The defendants handed him the appropriate registration book, a receipt showing the agreed price of £710, the cash payment of £10, and the payment by cheque of £700, and, knowing that he was going to show it to a prospective buyer, they let him drive the Standard car away. The Hillman car was duly left with the defendants as security for the cheque but shortly afterwards, during the absence from the garage during the lunch period of the members of the defendant company and their workshop manager, Greenaway, or another man who had been with him, returned to the garage and drove the Hillman car away, leaving the defendants without the security arranged.

On May 15, 1951, the plaintiff, after a trial run, negotiated the purchase from Greenaway of the same Standard car for the sum of £300 together with a car belonging to the plaintiff in exchange. Acting in good faith, without any knowledge of any defect in Greenaway's title or authority to sell and deliver the car to him, the plaintiff paid the money in two instalments, handed over his own car, and received from Greenaway the Standard car and its registration book.

The cheque given by Greenaway to the defendants was worthless, and subsequently the police called on the plaintiff and took the car away. Greenaway was charged with obtaining the car by larceny by a trick or by false pretences, and was convicted by a jury of obtaining the car by false pretences, and was sentenced to twelve months' imprisonment. The car was returned by the police to the defendants. The plaintiff demanded the return of the car from the defendants who refused to deliver it to him.

The plaintiff brought the action claiming the return of the car or its value and damages for its detention, or, alternatively, damages for the conversion of the car. The defendants denied that the car at any material time had belonged to the plaintiff, and they contended that it was at all material times, and continued to be, their property.

D. Weitzman Q.C. and *Leonard Halpern* for the plaintiff.
John Wilmers for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

May 28. Sellers J. The plaintiff claims the return of a 12-h.p. Standard motor-car, SMH.538, which the defendants have kept in their possession since September 20, 1951, when they were asked to hand it over to the plaintiff and refused to do so. The defendants assert that the car belongs to them.

In the early part of May, 1951, the car admittedly belonged to the defendants. The question for the court is whether they sold it, or agreed to sell it, to one Greenaway (a man who carried on some sort of business as a dealer in motor-cars) or parted with the possession of it to him in such circumstances as to enable him to give a good title to the plaintiff to whom Greenaway ostensibly sold it.

[His Lordship stated the facts substantially as set out above and continued:] The transaction was admitted by the defendants to have been unusual; the receipt made no reference to the security, and the defendants do not seem to have been very diligent or concerned when they returned to the garage and found that the Hillman car, which was their security, had been removed. The property in the Standard car did not pass to Greenaway. I find that the defendants, believing it to be an honest transaction, intended the property to pass if and when the cheque for £700 was met, but I do not feel sure that this was expressly stated in the discussions.

The conduct of Greenaway was fraudulent throughout. The cheque he offered was worthless, as he well knew, and when he failed to acquire the car by a false pretence, he obtained the possession of it by purporting to leave the Hillman car as security, but in fact intending to take it away at the first opportunity, which he had foreseen, no doubt, would be when those in the garage went off to lunch. I find that the defendants knew that Greenaway was taking the Standard car away to show to a prospective customer, and they let him take it away with the appropriate registration book and with their receipt of May 12, 1951, which contains the words: "Standard D/H 1947 (Nov.). "Seen and approved at the agreed price of £710."

In these circumstances, notwithstanding the fraudulent conduct of Greenaway throughout, unless authority requires me to hold otherwise, I would find that Greenaway, having agreed to buy the Standard car, obtained possession of it with the consent of the defendants, the sellers, and that he sold and delivered it to the plaintiff, who received it in good faith and without notice of any lien or other right of the defendants, the original sellers, in respect of the car. If these findings are correct, then the plaintiff obtained a good title under section 9 of the Factors Act, 1889.

It was not disputed before me that Greenaway had, at least, agreed to buy the car. If he had bought it, that is, if the property had passed, it would have been a case of obtaining the car by false pretences, which would have created a voidable contract. In that case it was conceded that the plaintiff would, in the circumstances, have obtained a good title. But, as there was only an agreement for sale and the actual possession of the car was obtained fraudulently by means of the trick, a deception of granting security which it was never intended by Greenaway to give, it was submitted that Greenaway never had any title to transfer to the plaintiff, and that the plaintiff could not rely on section 9 of the Factors Act or section 25 (2) of the Sale of Goods Act, 1893, because the possession of the car was not obtained with the consent of the defendants.

Counsel for the defendants, in a sustained and interesting argument, referred to the long-standing divergence of view on the words "with the consent of the owner (or the seller)" in the Factors Act. He submitted that it was open to this court to take either view, and that the preferable one was that expressed in

Oppenheimer v. *Frazer & Wyatt*,[1] where all the members of the Court of Appeal expressed the opinion that, where there was larceny by a trick, in the eyes of the law it was stealing and the person who so obtained the goods could not be said to have obtained them " with the consent of the owner." Counsel relied also on the dissenting judgment of Atkin L.J. in *Lake* v. *Simmons*,[2] in the course of which Lord Atkin said [3]: " The truth " is that the supposed consent in the physical delivery of the " chattel to the thief is no consent where the circumstances " constituting larceny by a trick exist, and is no consent whether " you view the transaction in a criminal or a civil proceeding."

These are opinions of great weight, but there is also powerful authority to the contrary. As Lord Sumner put it in *Lake* v. *Simmons* [4]: " On the bearing, which apparent consent, obtained " by a trick, may have on the ' consent,' which is mentioned in " section 2 of the Factors Act, 1889, there has been so signal " and so indecisive a conflict of authoritative opinion, that I " should be loth to offer any conclusion of my own, unless it was " quite clear that the point was necessary to the decision of this " case. I think it is not." That case was decided in the House of Lords on other grounds, and the question remains undetermined by that tribunal.

Counsel for the plaintiff relied on *Folkes* v. *King*,[5] in which both Bankes and Scrutton L.JJ. held that, as the plaintiff in that case in fact consented to a mercantile agent having possession of a car, it was immaterial whether the latter committed larceny by a trick, and also on *Pearson* v. *Rose & Young Ld.*,[6] in which the Court of Appeal recently, after a full argument, reviewed the authorities on the point.

These two cases arose under section 2 of the Factors Act. But whatever interpretation is to be given to the word " consent " in section 2, it must, I think, also be given to the word in section 9 of that Act and section 25 of the Sale of Goods Act.

If I were inclined to take a view contrary to that so lately expressed by the Court of Appeal I would have had to consider carefully how far it was open to me to do so now that the present Court of Appeal has expressed its preference for and approval of one of the earlier views which have been so long in conflict. I find myself, however, in full accord with the view now taken and

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[1] [1907] 2 K.B. 50.

[2] [1926] 2 K.B. 51.

[3] Ibid. 71.

[4] [1927] A.C. 487, 510.

[5] [1923] 1 K.B. 282.

[6] [1951] 1 K.B. 275.

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particularly with those extracts from the judgments of Bankes and Scrutton L.JJ. in *Folkes* v. *King*,[7] which appear in the judgment of Somervell L.J. in *Pearson* v. *Rose & Young Ld.*,[8] with which conclusion and the reasons given for it he agrees in preference to the contrary opinions to which he had already referred. Denning L.J.[9] holds as follows: "The fact that the "agent is guilty of larceny by a trick does not prevent the operation of the Factors Act, 1889, any more than the fact that he "has been guilty of larceny as a bailee." In those circumstances, I do not feel justified in going through the cases again in this judgment.

Mr. Wilmers submitted that the Court of Appeal in *Pearson* v. *Rose & Young Ld.*[10] had been inconsistent in that, in respect of the log book, the court had found no consent of the owner to the agents' possession because the agent had obtained it by a trick. I am inclined to think, on the contrary, that this illustrates the real point. In each circumstance, the inquiry is whether the possession was obtained with the consent of the owner (or the seller) and that it is his knowledge and intention which have to be assessed. The question which the court put to itself was: "Did the owner of the car mean to leave the registration book "with Hunt (the agent)?" And the answer on the facts was "No." The answer that there was no consent to Hunt's possession of the log book was not based on Hunt's fraudulent intention, but on the owner's conduct, knowledge and intention.

On the facts of the present case, I find it impossible to hold that the defendants did not consent to Greenaway having possession of the Standard car. To hold otherwise would, in my opinion, be wholly unreal. Scrutton L.J., in *Folkes* v. *King*,[11] said: "I do not think Parliament had any intention of applying "the artificial distinctions of the criminal law to a commercial "transaction, defeating it if there were larceny by a trick, but "not if there were only larceny by a bailee, or possession "obtained by false pretences." Atkin L.J., on the other hand, in *Lake* v. *Simmons*,[12] described it as a logical absurdity that at one and the same time a person could take the goods without the consent of the owner (that is, by larceny by a trick) and be entrusted with the goods by the true owner (for example, under the Factors Act). Possession of goods may be obtained by a trick or deception in circumstances which amount to stealing, and the same facts may negative consent to the transfer of the goods from any point of view, for example, where the transferor (through the fraud) thinks he is dealing with someone other than the transferee, or thinks he is transferring different goods from those which the thief actually obtains. But in the perhaps more rare cases where the "logical absurdity" might be said to arise, it may be that the artificiality is on the side of the criminal law and not the civil law.

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[7] [1923] 1 K.B. 282.

[8] [1951] 1 K.B. 275, 285.

[9] Ibid. 287.

[10] [1951] 1 K.B. 275.

[11] [1923] 1 K.B. 282, 305.

[12] [1926] 2 K.B. 51, 70, 71.

In the tenth and latest edition of Russell on Crime (of which Mr. Cecil Turner is the present editor) there is an historical and critical study of the law relating to larceny by trick. At page 1087 it is stated: "The argument on which the case of *Pear*[13] "was decided"—that was in 1779—"was that the fraudulent "intention of the transferee at the inception of the transaction "in some way negatived in law the consent of the owner to do "what he in fact did, namely, to put the horse in the hands of "Pear so as to make him bailee of it. If this doctrine were "sound there is no logical escape from the conclusion that the "existence of the like fraudulent intention ought to have the "same effect, so as to negative the consent of the owner, when "the transaction is not one of purported bailment involving the "transfer of possession merely, but when the transaction is, for "example, one of the purported sale, involving the transfer of "the ownership of the chattel." I take further extracts from page 1089: "The decision of the judges in *Pear's* case,[13] that "the deceit which eliminated the consent which the owner "intended to give when he regarded himself as parting with "merely the possession of his chattel would not have the same "effect when he regarded himself as parting with something "greater, namely, the ownership of it, was firmly maintained by "subsequent courts in a multitude of cases. . . . The doctrine "of the *Pear* case[13] was anomalous, but it was highly important "since it did much to expand the common law of larceny to meet "a social need. It was widely applied, and the special offence "which it covered came to be known as 'larceny by a trick,' an "inapt name which has caused a good deal of confusion in later "law." This conclusion is expressed on page 1102: "By the "decision in *Pear's* case[13] a new crime was created which was "purely arbitrary and did not rest upon principle."

I accept and adopt these views, which have been so clearly expressed and so well supported by authority and argument. I see no reason to interpret "consent" in the Factors Act in an artificial way in order to bring it into harmony with the criminal law based on such foundations.

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[13] (1779) 2 East P.C. 685; 1 Leach 212.

In my judgment, therefore, the plaintiff has established a good title to the motor-car claimed, and I make an order for its return to him.

Judgment for the plaintiff.

Solicitors: *S. Kalman & Co.; Seaton Taylor & Co.*

J. F. L.

REGINA *v.* EAST KERRIER JUSTICES.
Ex parte MUNDY.

Divl. Ct.
1952
May 29.

Lord Goddard C.J., Hilbery and Devlin JJ.

Justices—Practice—Justices' retirement with clerk to consider their finding—Clerk sent into court to receive information from police concerning defendant's previous conviction—Formal proof of previous conviction given in court on their return—Sentence—Irregularity.

After justices had retired to consider whether or not to convict the defendant their clerk came from their private room into the court where he was seen to receive from the police officer in charge of the prosecution a document which recorded the defendant's previous conviction for a similar offence. The clerk took the document into the justices' room; and on returning to court the justices announced that they had decided to convict the defendant. They required formal proof of the defendant's previous conviction and then announced their sentence. On the defendant's application for an order of certiorari the justices stated in their affidavit that they had decided to convict before they received any information about the defendant's previous conviction.

Held, that, as the justices did not state in open court at the time of convicting that they had decided to do so before receiving information about the previous conviction, the proceedings were still tainted by their error of form; and that as it might appear that justice had not been done the conviction would be quashed.

Davies v. *Griffiths* (1937) 53 T.L.R. 680 distinguished.

It is irregular for the justices' clerk to retire with them as a matter of course: he should remain in court until they send for him to seek his advice on matters of law, or until they return to court.

Application for an order of certiorari.

The applicant, Cyril Vivian Mundy, was convicted on February 27, 1952, by East Kerrier justices at petty sessions of driving a motor-vehicle without due care and attention, contrary to section 12 of the Road Traffic Act, 1930. He was fined £5 and his driving licence was suspended for three months.

The applicant sought an order of certiorari to bring up and quash his conviction on the following grounds: At the hearing by the justices the applicant, who was not represented, pleaded not guilty to the charge. After both sides had presented their case the justices retired to consider their finding. While they were still out of court their clerk, who had retired with them, returned to the court and obtained from the police officer in charge of the prosecution a document recording the fact of the applicant's previous conviction in 1950 of an offence of driving a motor-car without due care and attention. The clerk returned with the document to the justices' room, and later the justices returned to court and their chairman said that they had decided to convict the applicant. A police officer then formally proved the previous conviction, and the chairman announced the penalty which would be imposed on the applicant without giving him an opportunity of being heard further.

F. S. Laskey for the applicant. The mistake in the proceedings before the justices amounts to an infringement of the rule that not only must justice be done, but it must be seen to be done. No one knows what was in the justices' minds when they sent for the document in question, but they had not announced in open court their intention to convict or to acquit. In *Davies* v. *Griffiths* [1] there was held to have been no miscarriage of justice where justices looked at the defendant's previous convictions before announcing their decision to convict him, but that case is distinguishable from the present one because there the error of form was rectified by the justices, who later announced in open court that they had decided to convict before receiving the information. Recently, in *Rex* v. *Bodmin Justices; Ex parte McEwen*,[2] a Divisional Court granted an order of certiorari where justices had interviewed an officer of the accused's unit about his character in their private room, although it was done with kindly intentions towards the accused man.

The retirement of the clerk with the justices makes the proceedings even more objectionable and is a practice which this court has condemned.

H. E. L. McCreery for the respondent police inspector did not oppose the application as in his opinion it was possible that justice might seem not to have been done to the applicant. He directed the court's attention to *Hastings* v. *Ostle* [3] and *Hill* v. *Tothill.*[4]

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[1] (1937) 53 T.L.R. 680.

[2] [1947] K.B. 321.

Laskey replied.

LORD GODDARD C.J. In this case Mr. Laskey moves for an order of certiorari to bring up and quash the conviction of Cyril Vivian Mundy, who was convicted at the petty sessional court of East Kerrier in Cornwall of the offence of driving without due care and attention and in respect of which he was fined £5 and his driving licence suspended for three months.

The difficulty which has arisen in this case is this. When the justices retired, their clerk retired with them and then came out of the room and was seen to speak to a police officer, from whom he received a piece of paper which he took back with him into the retiring room of the justices. The justices then returned into court, and, without saying any more, announced that they convicted and called for previous convictions, if any. The police officer proved a previous conviction. The clerk to the justices informed the court of the penalty which could be imposed and the justices announced their decision, a fine of £5 and three months' suspension.

It was contended on the part of the applicant that the course which the justices took in sending for and taking into account this communication invalidates the conviction because it was doing something, so to speak, behind the applicant's back and receiving evidence otherwise than in court. A good many cases have been cited to this court on the subject, and as a general rule, as we pointed out in *Rex* v. *Bodmin Justices; Ex parte McEwen*,[5] it will invalidate a conviction if evidence is given or appears to be given to justices otherwise than in open court, because the defendant has no means of dealing with it.

The court has considered *Hastings* v. *Ostle*,[6] where Lord Hewart C.J. said: "It is quite clear that, after retiring to the "ante-room to consider their decision on the first group, the "justices sent for information as to previous convictions for "fishery offences against the appellants. It is clear that they "did not send for that information until they had unanimously "come to the conclusion that the charge against each of the "appellants had been proved, but it is also clear that, for the "purpose of their considering what would be the appropriate "penalty, the clerk obtained the record cards of the appellants

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[3] (1930) 46 T.L.R. 331.

[4] [1936] W.N. 126

[5] [1947] K.B. 321.

[6] 46 T.L.R. 331, 332.

"from the superintendent of police, and informed the justices "that there had been two previous convictions for fishery offences "against two of the appellants and one such conviction against the "third. The justices did not inspect the cards nor see any police "reports nor obtain any information with regard to convictions "for other offences. They decided to inflict a fine of £5 on each "appellant. Then they say in the case, 'We then returned to "'court and announced our said determination.' In those circum-"stances it is quite clear that the justices took a course which "they ought not to have taken. The proper course was to return "into court when they had decided to convict, and then openly "and publicly in the presence of the appellants to inquire into "their previous careers, in circumstances in which the appellants "could then and there have had an opportunity of dealing "publicly with the matter."

It seems to me that in that case the court quashed the conviction not because of information which had been taken into the justices' room, but because the justices did not, when they returned into court, require the previous convictions to be proved. In *Hill* v. *Tothill*,[7] Lord Hewart C.J. said: "It appeared that "the justices had privately informed themselves of a previous "conviction of the defendant, when deciding upon the sentence "to be imposed, and that on returning into court they convicted "and pronounced sentence upon the defendant without requiring "the previous conviction to be proved." That, again, was held to be a ground for quashing.

In *Davies* v. *Griffiths*,[8] to which the justices themselves have called attention, there was this difference: the justices retired and decided to convict, returned to court, but before they announced their decision asked for the previous convictions. When they had received the previous convictions they retired again and then came back into court and announced the conviction and penalty. On the defendant's solicitor objecting to the course which had been taken, the justices said that they had decided to convict before becoming acquainted with the previous convictions. The court in that case refused to quash the conviction because everything had been done in open court.

In the present case the information with regard to the previous conviction was in the first instance conveyed to the justices in their room, and that, the court thinks, was wrong and ought not to have been done. Nothing was said in court concerning what the justices had sent for, and for all that the defendant knew any statement might have been made on that piece of paper. It might have been a statement by the police officer of something which he had forgotten to say in evidence. After they had obtained the document the justices did come back into court and ask for the formal proof of the previous conviction, and in that they were acting quite rightly. It is possible that, had they then announced in court that the only piece of information which had been conveyed to them was the fact of that previous conviction and that they had made up their minds before then to convict, we might have dealt with the case in the same manner as the court did in *Davies* v. *Griffiths* [8]; but that was not done. Until the affidavit in this case was filed by the justices the applicant never knew what the state of affairs was. He did not know that the justices had made up their minds to convict before the information with regard to the previous conviction was conveyed to them. In these circumstances, and not without some hesitation, I have come to the conclusion that we ought to quash this conviction.

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[7] [1936] W.N. 126.

[8] 53 T.L.R. 680.

I wish to mention another matter. I think that it has been said more than once in this court that it is not right that the justices' clerk should retire with them. It has been often said that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk; and if the clerk retires with the justices, the inevitable conclusion that people will form is that he may influence the justices or may take some course which it is for the justices alone to take. Justices can always send for the clerk if they require advice on a point of law, because that is what the clerk is there for; but it is not desirable, and is irregular, for a clerk to retire with justices as a matter of course when they are considering the facts. If they want his advice, they should send for him from the court, where he should remain until the justices either return into court or send for him. I need not say whether we should have quashed the conviction on the ground that the justices' clerk retired with them. We think that it is undesirable and we hope in future that justices' clerks will not retire with their bench; they should only go if the justices require their advice.

For these reasons I think that the conviction should be quashed.

HILBERY J. I have felt the greatest doubts about whether we should quash this conviction, but finally my Lord's analysis of the cases and the reasons which he has given for quashing this conviction have persuaded me that it is the course we should take, and I therefore agree.

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[8] 53 T.L.R. 680.

Devlin J. I agree, also after some little hesitation, because I think that the authorities on the matter are not entirely clear, but I agree entirely with everything which Lord Goddard C.J. has said. I should like to state what I believe to be the principle on which the court is acting. We are not concerned with a case of actual injustice; if we were, that would be the end of the matter, and clearly the conviction would be quashed. We are concerned with an infringement of the rule that justice must not only be done but must also manifestly appear to be done, and, accordingly, we are concerned with matters of form. Courts have held in the past that it is important not only that justice should be done, but also that it should be seen to be done, so that a person who is guilty should know that there has been no injustice. It is better that he should go free than that the rule that justice should not only be done but be seen to be done should be infringed. In a case of this kind, where the question is whether the court should quash a conviction or exercise its discretion in upholding a conviction, the important matter is what appears to have been done in the course of the proceedings, and that is why I think that *Davies* v. *Griffiths*,[8] which at first sight appears to be very similar to this case, is rightly distinguished by Mr. Laskey by the course that was there taken.

In *Davies* v. *Griffiths* [8] the justices likewise considered some previous convictions when they retired, but when they came back a point was taken in court. The report states that the solicitor appearing for the appellant "objected to the justices' procedure "in not announcing in court their decision to convict, before "hearing the previous convictions, as irregular, but they informed "him that they had come to a decision during their first retirement before they were informed of the appellant's previous "convictions"; in other words, the error was then publicly corrected. No person who sat in the court when *Davies* v. *Griffiths* [8] was heard, unless he was going to suggest that the justices had acted in bad faith (and that was not suggested in that case, nor is it suggested here), could have left the court after the hearing with the impression that some injustice had been done; because if he believed the statement which had been made in open court, no injustice had been done. The error of form, if I may so put it, was publicly put right in the course of the proceeding which he had heard.

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[8] 53 T.L.R. 680.

The distinction here, to my mind, is that the error was not so put right. The matter was not raised in court; the applicant was defending himself, and, on the face of it, as my Lord has said, it therefore appeared that some piece of paper the contents of which nobody knew, had been taken into the justices and had apparently influenced them, or might have influenced them, in arriving at their decision. A writ of certiorari is the natural step to take as the consequence of that, and it was not until the affidavit was given this morning to Mr. Laskey, who appears for the convicted person, that anybody knew what the justices' explanation was. It is an explanation which I think the court has unhesitatingly accepted, and it shows that the error was made in good faith, but as it was not stated in open court at the time of the proceedings themselves, it leaves those proceedings still tainted, if I may so put it, with the fact that an injustice was apparently done.

On those grounds I agree that the conviction should be quashed.

Application granted.

Solicitors: *Balderston, Warren & Co., for R. C. Henderson, Falmouth; Barlow, Lyde & Gilbert, for Stephens & Scown, St. Austell.*

S. C.

GREEN AND ANOTHER *v.* THAMES LAUNCHES LD.

[1952 G. No. 1498]

1952
June 25, 27.

Lord Goddard C.J.

Licensing — Passenger vessels — Sale of intoxicating liquors — Excise licence—Sale outside "permitted hours"—Legality—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 43, *Sch. I—Licensing* (*Consolidation*) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 111—*Licensing Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *s.* 18.

If the master of a passenger vessel, or some other person, has been granted an excise licence under the Finance (1909–10) Act, 1910, authorizing the sale of intoxicating liquor in the vessel, the provisions of the Licensing Act, 1921, in relation to permitted hours for the sale of intoxicating liquor do not, by virtue of section 22 (2) of that Act and of the exemption contained in section 111 (2) (*f*) of the Licensing (Consolidation) Act, 1910, apply to the sale of intoxicating liquor in the vessel, provided

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that the sale is to passengers on the vessel for consumption on the vessel during the voyage in accordance with the provisions of Sch. I, D to the Finance (1909–10) Act, 1910.

Gallagher v. *Rudd* [1898] 1 Q.B. 114 distinguished.

ACTION.

The plaintiffs were shareholders in the defendant company, which owned a fleet of passenger vessels plying on the River Thames between Westminster and Hampton Court. The masters of 12 of their vessels, or some other person, held an excise licence granted by the Commissioners of Customs and Excise pursuant to the Finance (1909–10) Act, 1910, authorizing each to sell intoxicating liquors and tobacco to passengers for consumption on the vessel.

The plaintiffs alleged that, contrary to the provisions of the Licensing Act, 1921,[1] the defendants had since 1945 habitually sold, and intended to continue to sell, intoxicating liquor by retail on each of the vessels at times other than those prescribed by the Act as "permitted hours," and they claimed a declaration that it was illegal for the defendants either to sell or to permit the consumption of intoxicating liquor in passenger vessels, while the vessels were engaged in carrying passengers, except during the "permitted hours" as defined by the Licensing Act, 1921, and an injunction to restrain the defendants by their servants or agents from so selling or permitting the consumption of intoxicating liquor except during the permitted hours.

The defendants admitted that they had sold, and intended to continue to sell, intoxicating liquor at times other than during the permitted hours. They contended that they were authorized by their licences to do so, and that the provisions of the Licensing Act, 1921, in relation to permitted hours did not apply to the sale or consumption of intoxicating liquor in their vessels while engaged in carrying passengers.

Wingate-Saul for the plaintiffs. In *Gallagher* v. *Rudd*[2] it was held that the proprietor of a theatre who held an excise licence entitling him to sell intoxicating liquor in his theatre was not exempted from the provisions relating to closing hours contained in the Licensing Act, 1874. That Act had to be read with the Licensing Act, 1872, which, by section 72, provided that: "Nothing in this Act shall affect or apply to . . . (*f*) the sale of "intoxicating liquors by proprietors of theatres, in pursuance "of the Acts in that behalf." The court held that the words "in pursuance of the Acts in that behalf" confined the exemption to the particular rights given by express statutory provisions relating to theatres, and Wright J. said[3]: "I think that the "same principle of construction would apply to the sale of intoxi-"cating liquors in packet-boats and canteens." The Acts in force at that time were the Excise Licences Act, 1825, which by section 13 provided that a justices' licence must be obtained before an excise licence could be granted, and, in relation to theatres, the Excise Act, 1835, exempting theatre proprietors from the necessity of obtaining a justices' licence; the court held that the exemption contained in the Licensing Act, 1872, referred to the exemption from the necessity of obtaining a justices' licence. The relevant Act in relation to passenger vessels was then the Passage Vessel Licences Act, 1828.

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[1] Licensing Act, 1921, s. 4: "Subject to the provisions of this "part of this Act, no person shall, "except during the permitted hours— "(a) either by himself, or by any "servant or agent, sell or supply to "any person in any licensed premises "or club any intoxicating liquor to "be consumed either on or off the "premises; or (b) consume in or take "from any such premises or club any "intoxicating liquor."

[2] [1898] 1 Q.B. 114.

The Acts now in force are the Finance (1909–10) Act, 1910, under which excise licences for the sale by retail of intoxicating liquor on passenger vessels are granted, the Licensing (Consolidation) Act, 1910, and the Licensing Act, 1921, which defines the permitted hours and prohibits the sale of intoxicating liquor except during the permitted hours; by section 18: "The provi-"sions of this Act with respect to licensed premises apply to any "premises or place where intoxicating liquors are sold by retail "under a licence. . . ." By section 22 (2) the Licensing Act. 1921, is to be read as one with the Licensing (Consolidation) Act, 1910.

If the dicta concerning packet boats in *Gallagher* v. *Rudd*[4] are correct, it is submitted that they cover the present case because, although the wording of the Passage Vessel Licences Act, 1828,[5] is substantially different, the relevant provisions in

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[3] [1898] 1 Q.B. 114, 118, 119.

[4] Ibid. 114.

[5] Passage Vessel Licences Act, 1828: ". . . it shall be lawful for "the Commissioners of Excise . . . "to grant a licence to any Master or "Commander of any Packet, Boat, "or other vessel employed for the "Carriage and Conveyance of Pas-"sengers . . . and . . . every such "licence . . . shall fully authorize ". . . the Person . . . named . . . "to supply, retail, and sell . . . "liquors and tobacco . . . to be "consumed in and on board of such "vessel by the Passengers thereof, "during any voyage on which such "Passengers shall be carried and "conveyed . . . anything in any Act ". . . in force immediately before the "passing of this Act to the contrary "notwithstanding."

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the Finance (1909–10) Act, 1910,[6] do not authorize anything that is materially different, nor does the wording of the exemption contained in section 111 (2) of the Licensing (Consolidation) Act, 1910,[7] differ from the wording of the exemption construed in *Gallagher* v. *Rudd.*[8] Despite the repeal of the Act of 1828, *Gallagher* v. *Rudd*[8] applies today. In each case the sale is under a licence authorizing the holder to sell intoxicating liquor under similar conditions and restrictions; only if those similar provisions are given different meanings can *Gallagher* v. *Rudd*[8] be distinguished; in that case an exemption almost identical with that in section 111 (2) of the Licensing (Consolidation) Act, 1910, was construed and it is relied on as covering the present facts.

The effect of section 18 of the Licensing Act, 1921, is to apply the provisions in the Act relating to permitted hours for the sale of intoxicating liquors in licensed premises to the sales on the defendants' vessels.

Percy Lamb Q.C. and *Gordon Hardy* for the defendants. If it were not for *Gallagher* v. *Rudd*[8] there would be no difficulty in giving the words in section 111 (2) of the Licensing (Consolidation) Act, 1910, "Nothing in this Act . . . shall . . . apply to "(*f*) the sale of intoxicating liquor in passenger vessels in pur"suance of the Acts in that behalf" their normal and natural meaning. The Acts relating to theatres were different from those concerned with passenger vessels: see, in particular, the full title and preamble to the Act of 1828 and the Licensing Act, 1842. Section 13 of the Excise Licences Act, 1825, refers to a sale upon the "house or premises" of the person applying for the licence; those are not apt words to apply to a passenger vessel. Section 5 of the Licensing Act, 1842, shows that it was not thought that section 42 of the Metropolitan Police Act, 1839, applied to passenger vessels moored in the Thames. The Licensing (Consolidation) Act, 1910, repealed the Act of 1842 except for section 5.

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[6] Finance (1909–10) Act, 1910, s. 43: "There shall be charged, "levied, and paid on the licences for "the . . . sale of intoxicating liquor "specified in the First Schedule to "this Act, the duties of excise "specified . . . and the provisions "expressed in that Schedule to be "applicable to any such licences shall "have effect with respect to those "licences."

Sch. I, D: "*Provisions applicable* "*to Passenger Vessel Licences.* 1. A "passenger vessel licence granted in "respect of any vessel authorizes the "sale by retail while the vessel is "engaged in carrying passengers of "any intoxicating liquor on the "vessel to passengers for consump"tion on the vessel."

[7] Licensing (Consolidation) Act, 1910, s. 111 (2): "Nothing in this "Act shall affect or apply to . . . "(*f*) the sale of intoxicating liquor "in passenger vessels in pursuance "of the Acts in that behalf."

[8] [1898] 1 Q.B. 114.

In *Gallagher* v. *Rudd*[9] the court held that the words of the exemption in section 72 of the Licensing Act, 1872, only referred to the obligation to obtain a justices' licence. If that be right, and if the same intention of Parliament is also to be found in section 73, that construction must be confined to theatres and the words in section 72 given their full meaning, and *Gallagher* v. *Rudd*[9] is only applicable in the case of a theatre. The position, therefore, until the passing of the Finance (1909–10) Act, 1910, was that intoxicating liquor could be sold on passenger vessels without a justices' licence under the Act of 1828 and that nothing in the Act of 1872 was to apply. In 1898 there was nothing to justify the view that the regulations applicable to theatres also applied to packet boats and canteens; in the Finance Act of 1910 the same phraseology is used as in the earlier Acts.

The Licensing Act, 1921, is to be read with the Licensing (Consolidation) Act, 1910, which exempts passenger vessels from the general licensing provisions. It must be that section 18 of the Act of 1921 applies that Act to licensed premises only because licensed premises are defined by reference to a justices' licence; had any other place been intended an off-licence would not have been covered: see section 110 of the Act of 1910. Section 111 (2) of the Licensing (Consolidation) Act, 1910, is relied on and it is submitted that, reading section 18 of the Act of 1921 in conjunction with the Act of 1910, section 18 is not to apply to sales of intoxicating liquor on passenger vessels. Any other construction of those provisions would be impracticable; permitted hours vary from district to district, yet the same provisions apply to railway restaurant cars and to aircraft.[10]

Cur. adv. vult.

June 27. LORD GODDARD C.J. The defendants are a company owning a fleet of passenger vessels plying on the River Thames for the conveyance of passengers between Westminster and Hampton Court. The master of each of these vessels or some other person belonging thereto holds a passenger vessel licence granted by the Commissioners of Customs and Excise under the Finance (1909–10) Act, 1910, enabling them to sell intoxicating liquor to passengers on the vessels and the plaintiffs, who are shareholders in the company, bring this action claiming certain declarations and injunctions with the object of obtaining a decision on the question whether intoxicating liquor can be lawfully sold on these vessels at hours other than those permitted by the Licensing Act, 1921. The action is in fact one which is usually called a friendly action whereby the shareholders desire to obtain a ruling whether their company is doing something within or without the law, as was done in the well-known case of *Powell* v. *The Kempton Park Racecourse Company Ld.*[11]

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[9] [1898] 1 Q.B. 114.

[10] See the Finance Act, 1946, s. 9.

Section 43 of the Finance Act of 1910 provides that "There "shall be charged, levied, and paid on the licences for the "manufacture or sale of intoxicating liquor specified in the First "Schedule to this Act, the duties of excise specified in that "Schedule, and the provisions expressed in that Schedule to be "applicable to any such licences shall have effect with respect "to those licences." The schedule provides for a duty of £10 to be paid in respect of an annual licence taken out by the master or other person belonging to the vessel nominated by the owner, and a duty of £2 if it is to be in force for one day only. The provisions applicable to these licences are that a passenger vessel licence granted in respect of any vessel authorizes the sale by retail while the vessel is engaged in carrying passengers of any intoxicating liquor on the vessel to passengers for consumption on the vessel, and authorizes the sale of tobacco as well as of intoxicating liquor. A passenger vessel is defined in section 52 and means "a vessel of any description employed for the carriage "and conveyance of passengers which goes from any place in the "United Kingdom to any other place in the United Kingdom, or "goes from and returns to the same place in the United Kingdom "on the same day." The Licensing Act, 1921, substituted hours during which liquor may be sold on licensed premises for provisions in the Act of 1910 which prescribed the hours during which premises had to be closed, so that any offence dealing with this subject-matter now is for the sale otherwise than during permitted hours whereas formerly it was for the sale during closing hours.

The contention of the plaintiffs briefly is that the matter is governed by section 18 of the Act of 1921 which provides that the provisions of the Act with respect to licensed premises apply to any premises or places where intoxicating liquors are sold by retail under a licence, so it is said that the sale on a passenger vessel can only take place within the same hours as liquor can be sold at licensed premises on shore. The Act of 1921 is to be considered as one with the Licensing (Consolidation) Act, 1910, and by section 111 (2) of the latter Act it is provided: "Nothing

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[11] [1899] A.C. 143.

"in this Act shall affect or apply to . . . (*f*) the sale of intoxi-"cating liquor in passenger vessels in pursuance of the Acts in "that behalf," and in order fully to appreciate the contentions on either side it will be convenient to deal as briefly as may be in chronological order with the Acts which have dealt with the sale of liquor on passenger vessels.

In 1825, by the Excise Licences Act, s. 13, it was provided that no excise licence should be granted for the sale of any beer or cyder or perry by retail to be drunk or consumed upon the house or premises of the person applying for such licence unless a justices' licence permitting the applicant to sell it had been first granted. I can find nothing to suggest that it was ever thought that a house or premises in this section included a vessel of any description. In 1828, in the Passage Vessel Licences Act, 1828, it was recited in the preamble that it would greatly tend to the convenience and accommodation of such passengers if the master or commander or other person of or belonging to such vessels were by law authorized to provide for and to retail and sell to such passengers carried in packet boats and other vessels from one part of the United Kingdom to another part not only the liquors referred to in section 13 of the Act of 1825 but also foreign wine, spirituous liquors and tobacco. By section 1 the Act authorized the commander or some other person to be licensed to retail such liquors but only to passengers on board such vessels and to be consumed by them in and on board thereof during the voyage. The section concluded with the words "any thing in "any Act or Acts in force immediately before the passing of this "Act to the contrary notwithstanding."

On the same day that this Act received the Royal Assent the well-known Alehouse Act, 1828, also became law. That Act dealt generally with the grant by justices to fit and proper persons of licences authorizing them to keep inns and alehouses and to sell excisable liquors of all sorts, but as it came into force contemporaneously with the Passage Vessel Licences Act it was not in force immediately before the passing of the latter Act.

In 1839, by section 42 of the Metropolitan Police Act, it was enacted that no licensed victualler or other person should open his house within the Metropolitan Police District for the sale of liquor on Sundays, Christmas Day and Good Friday before the hour of one in the afternoon except for refreshment for travellers. It seems to have been recognized that that section did not apply to the sale of liquor on a ship that was moored in the Thames, and no doubt sellers of liquor took full advantage of that situation. So, by the Licensing Act, 1842, s. 5, which is still in force, it was expressly provided that "no . . . liquors shall be "sold by retail on board of any boat, steamboat, or other vessel "which shall be moored or lying at anchor within the Metro-"politan Police District, during the hours and times on Sundays, "Good Friday, and Christmas Day on which licensed victuallers "are by law obliged to keep their houses closed." This, it will be noticed, has no application when the boat or vessel is on a voyage on the river.

There the matter rested until the Licensing Act, 1872. By section 72 of that Act it was provided that nothing in the Act should affect or apply to, inter alia, the sale of intoxicating liquor by the proprietors of theatres in pursuance of the Acts in that behalf, and the sale of intoxicating liquor in packet boats in pursuance of the Acts in that behalf. I mention here the provision with regard to theatres because of a decision on which the plaintiffs rely and which I shall consider hereafter.

The Finance Act of 1910, to which I have already referred, received the Royal Assent on April 29 of that year, and on August 3 the Licensing (Consolidation) Act became law. In the latter Act the expression "licensed premises" is defined as meaning "premises in respect of which a justices' licence has "been granted and is in force," and by section 111 (2) the same exemption regarding theatres and passenger vessels is found as in the Act of 1872, and in precisely the same words.

The only other statutory provision to which I think it is necessary here to refer is section 18 of the Act of 1921, which I set out earlier, but as the Act of 1921 is to be read together with the Act of 1910 it follows that the exemption contained in that Act applies also to the Act of 1921, and therefore the provisions of section 18 applying the provisions of the Act with respect to licensed premises to any premises or places where intoxicating liquors are sold under a licence do not apply to the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf. It is therefore clear that from 1828 onwards the sale of intoxicating liquor in passenger vessels, provided an excise licence had been granted, has always been kept free from the provisions of general licensing Acts provided only that the sale has been in pursuance of the Acts relating to sales on these vessels, and it is to be observed that the Act of 1828 was not repealed till the Finance Act of 1910.

The Finance (1909–10) Act, 1910, which deals with the duty and the provisions applicable to such licences, contains in substance the same provision as the Act of 1828. The sale must be on a passenger vessel as defined in the Act, and liquor can only be supplied to passengers for consumption on the vessel and during the voyage. So the place, time and the customers are all designated by the Acts, and in my opinion it would be clear that the permitted hours which apply to sales on land do not apply to sales on passenger vessels were it not for a difficulty apparently caused by the decision in *Gallagher* v. *Rudd*.[12]

That was a case dealing with a sale at a theatre, and it will be remembered that the Act of 1872 excluded the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf as it did the sale of intoxicating liquor in packet boats. The Divisional Court held that that exemption did not apply to exempt the proprietor of a theatre from selling intoxicating liquor during closing hours. The court held that the effect of the exemption was only to allow the proprietor of a theatre to obtain an excise licence without obtaining a justices' licence. Wright J., having rejected two possible constructions, said[13]: "There remains a third possible meaning—namely, that although "the exemption is not absolute, and is not limited to the mere "sale, yet it is an exemption limited to the express statutory "provisions with respect to theatres. One of those is that "proprietors of theatres may sell intoxicating liquors by retail "under an excise licence; they are not required to have a "justices' licence. I think that the words in subsection (4), 'in "'pursuance of the Acts in that behalf,' intend to limit the "exemption to the particular rights which are given to proprietors "by the Acts in that behalf. One effect of that is that some of "the other exemptions contained in section 72 will not be "affected—at any rate the eighth exemption will not. I think "that the same principle of construction would apply to the sale "of intoxicating liquors in packet boats and canteens," and it is therefore said that that decision should be followed in deciding the present case.

Admittedly, the opinion expressed by the judge is only obiter, but great weight attaches to any opinion of his, more especially on the construction of statutes. I am, however, by no means certain that he meant to say that, so far as the sale of intoxicating liquors in packet boats was concerned, it was clear in his opinion that the exemption only excused the licensees from

[12] [1898] 1 Q.B. 114.

[13] Ibid. 118.

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obtaining a justices' licence. What he was holding was that the words in section 72 (4) of the Act of 1872 were intended to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf.

The Act which applied to theatres was the Excise Act, 1835, which by section 7 provided that it should be lawful for the Commissioners and Officers of Excise to grant retail licences to any person in any theatre licensed by the Lord Chamberlain or by justices of the peace without the production by the person applying for such licence of any certificate or authority for such person to keep a common inn, alehouse or victualling house. In view of those words I understand the court to have meant that the only privilege conferred on a theatre owner was to obtain an excise licence without first obtaining a justices' licence, but it seems to me that the provisions of the Acts dealing with sales on passenger vessels are much wider.

I have already pointed out that the Acts themselves lay down where liquor may be sold, to whom it may be sold and when it may be sold, the latter being during the voyage and only during the voyage. When the Act of 1828 was passed it was clear, I think, that no one could have contended that the master of a passenger vessel either ought to or could have obtained a justices' licence. Justices only granted licences in respect of alehouses, and no doubt did so before the Alehouse Act, 1828, came into force. It does not seem to me, therefore, that the reasoning which was applied by this court to theatres applies to passenger vessels.

The provisions of the Finance (1909–10) Act, 1910, apply to railway refreshment cars, and have now been applied to aircraft, and it seems to me to be impossible to hold that provisions with regard to permitted hours can apply to the sale of liquor in aircraft, nor has it ever been suggested that it applies to restaurant cars. The extraordinary difficulties which would arise with regard to passenger vessels, restaurant cars or aircraft can easily be appreciated when it is remembered that nowadays permitted hours vary not only from county to county but often from one licensing district to another. Justices have a considerable discretion as to permitted hours. In the provinces they can fix any eight hours beginning not earlier than 11 a.m. and ending not later than 10 p.m. with a break of at least two hours after 12 noon. In the metropolis nine hours are substituted for eight and 11 p.m. for 10 p.m. Outside the Metropolis justices can substitute eight and a half hours for eight and 10.30 for 10 o'clock at night, but this latter can only have effect if some hour is specified earlier than 11 a.m. but not earlier than 9 a.m. Thus it will be seen that it would be quite impracticable to apply the provisions of permitted hours to sales taking place during journeys which must pass through different districts where no uniformity may prevail.

It is also a remarkable fact that it has never yet been suggested, or certainly not till a recent prosecution at Liverpool which has yet to come before the High Court for a final decision, that the provisions with regard either to closing hours or permitted hours apply to these vessels although the Act of 1872 which first imposed closing hours has been in force now for 80 years.

For these reasons, in my opinion this action fails, as I decide that the provisions with regard to permitted hours do not apply to passenger vessels.

Judgment for the defendants.

Solicitors: *B. Hoddinott & Son; Lovell, White & King.*

J. F. L.

WABE *v.* TAYLOR AND WIFE.

[Plaint No. H. 124.]

C. A.

1952 *July* 7.

Somervell, Birkett and Hodson L.JJ.

Landlord and Tenant—Rent restriction—Possession—Non-occupying tenant—Deserting husband—Wife remaining in occupation and paying rent—Alleged matrimonial offence by wife—No action by husband to revoke wife's licence to remain in occupation—Landlord not entitled to possession.

The fact that a deserted wife has committed a matrimonial offence, though it would entitle the husband to revoke the implied licence under which a deserted wife can claim the protection of the Rent Restriction Acts in respect of the matrimonial home, does not entitle the landlord to possession of the premises if the husband takes no steps to revoke and the wife continues to pay the rent.

APPEAL from Judge Lawson Campbell, sitting at Wisbech county court.

The first defendant, who was the tenant of the dwelling-house 131 Norwich Road, Wisbech (premises within the Rent Restriction Acts) deserted his wife, the second defendant, in 1946. The wife remained in occupation of the house and continued to pay the rent to the landlord, the rent book continuing in the husband's name. After the husband left she took in a lodger, and in 1948 she gave birth to a child, of whom, it was alleged that she had admitted, the lodger was the father. In 1950 the plaintiff bought the house. He was a neighbour and knew of the circumstances in which Mrs. Taylor occupied the premises, but he continued for a time to accept the rent from her, although the rent book continued to bear the name of the husband. Later in the same year he served notice to quit on the wife on the ground that she was a trespasser, and when she refused to leave he brought the present proceedings against both husband and wife, claiming possession of the premises. The husband did not appear to the action. The county court judge refused an order for possession. The landlord appealed.

Gilbert Dare for the landlord. A deserted wife is entitled to remain in the matrimonial home by virtue of her husband's occupancy, but in my submission if she commits a matrimonial offence the husband's obligation towards her ceases. She no longer has a right to pledge his credit for necessaries or to remain in the house. Once there is found to be a guilty wife she can no longer claim a right to remain in the house.

[SOMERVELL L.J. It might be very material if the husband wanted to get out of his obligations, but I cannot see how a matrimonial offence comes into the question if the husband is not concerned.]

The wife is a licensee of the husband, but if she commits a matrimonial offence her licence ceases.

[SOMERVELL L.J. She is entitled to remain there as against the landlord so long as she pays the rent; she is entitled to remain as against the husband until he revokes the licence.]

There are no facts in the present case from which an intention of the husband to return can be inferred. The husband is a statutory tenant; he is no longer in occupation, and unless the wife can substantiate her claim through the husband she has no rights. In *Middleton* v. *Baldock*[1] Evershed M.R. said, in relation to the special position of a deserted wife: "If matters "had been otherwise and the wife had wronged the husband . . . "her right to be lawfully there would, of course, have come to "an end." So, also, in *Old Gate Estates Ld.* v. *Alexander*,[2] Denning L.J. said: "The reason [for not giving up possession] "is because the wife, so long as she is behaving herself properly,

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[1] [1950] 1 K.B. 657, 662.

[2] [1950] 1 K.B. 311, 319.

"has a very special position in the matrimonial home." These observations, it is submitted, support the contention that if she commits a matrimonial offence a deserted wife loses her right to remain in the home. [*Govier* v. *Hancock*[3]; *Bendall* v. *McWhirter*[4]; *Skinner* v. *Geary*[5]; and *Brown* v. *Brash*[6] also referred to.]

J. Widgery for the defendant wife. The conduct of the wife is no doubt relevant where the husband seeks to revoke her licence, but as long as her occupancy is lawful as regards her husband it is also lawful as regards the landlord. Until the husband takes such steps she retains her right to pledge his credit. What is a wrong against the husband should not be treated as a wrong against the landlord. The landlord accepted the occupancy of the wife as the occupancy of the husband, and knowing the facts he accepted rent from her. The county court judge came to the right conclusion.

SOMERVELL L.J. stated the facts and continued:—Since *Skinner* v. *Geary*[7] what I may call the general principle, as expounded in later cases, has been established that a non-occupying tenant cannot claim the protection of the Rent Acts. On the other hand, it is clear that the protection of the Rent Acts is not lost if, although a tenant is absent, he is regarded in law as still occupying, in possibly more ways than one. We are here concerned with whether he is occupying through his wife.

In *Old Gate Estates Ld.* v. *Alexander*[8] the husband had left his wife and furniture in a flat and he wrote the landlords saying that he had given up possession of the flat to them and he enclosed the key. He ceased to pay rent. "Later he handed "to the landlords, for their use, a document by which he purported to revoke any authority or leave which he might at any "time have given to his wife to occupy the flat. The wife "refusing to leave the flat at the landlords' request and the "husband's furniture still remaining there, the landlords sued "the husband and wife for the recovery of possession of the flat. "Between the date of the entry of the plaint and the hearing of "the action, the husband returned to his wife and the flat:— "*Held*, that, at the time of the entry of the plaint, his wife and "furniture remaining at the flat, the husband was still in posses"sion of it as a statutory tenant and, therefore, within the

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[3] (1796) 6 T.R. 603.

[4] Ante, 466.

[5] [1931] 2 K.B. 546.

[6] [1948] 2 K.B. 247.

[7] [1931] 2 K.B. 546.

[8] [1950] 1 K.B. 311.

"protection of the Rent Restriction Acts." Later cases have shown the special position of a deserted wife and her right to claim the protection of the Acts, subject to a suggested limitation, which I will now consider.

In *Middleton* v. *Baldock*[9] the house was let to a husband on a weekly tenancy, and there again he had deserted his wife. She remained in occupation of the house, which contained some of his furniture, and she paid the rent out of money received from him. In this case we were told (and I think there was evidence of it), anyhow, I accept it, that the money was not received from him, but I do not think that makes a difference. In *Middleton* v. *Baldock*[9] notice to quit was served and an action brought, as here, against husband and wife for possession, as against the husband on the ground that the contractual tenancy was at an end, and as against the wife as a trespasser. The husband in that case was offering immediate possession if, of course, he was in a position to do so. The county court judge made an order for possession against him and against the wife. It was held that "the order for possession made against the husband was "without jurisdiction and was erroneous in that a landlord "seeking to recover possession against a tenant protected by the "Rent Restriction Acts must establish the right to possession on "one of the grounds stated in the Acts, unless, after possession "had been claimed on such a ground, the tenant admitted facts "to support it, in which event the court need not itself investigate the matters of fact admitted; whereas the husband here "could not yield possession to the landlord seeing that his wife "was rightfully in possession vis-à-vis her husband, and his "offer of possession was accordingly futile as being one which "he was unable to perform in the absence of either the wife's "consent to go out of the house or an order for ejectment against "her."

In this case, Mr. Dare, for the landlord, relies on passages in the judgment of Evershed M.R. in which, in relation to the special position of a deserted wife, he says this[10]: "If matters "had been otherwise and the wife had wronged the husband; or, "if, though she was not the guilty party, an appropriate court, "on the husband's application, had ordered her to go out, then "her right to be lawfully there would, of course, have come to "an end." Later in his judgment he quotes a statement by Denning L.J. in *Old Gate Estates Ld.* v. *Alexander*[11]: "The

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[9] [1950] 1 K.B. 657.

[10] Ibid. 662, 667.

[11] [1950] 1 K.B. 319.

"reason [for not giving possession] is because the wife, so long "as she is behaving herself properly, has a very special position "in the matrimonial home." He adds, after a sentence or two, "he is not entitled to turn her out without an order of the court."

Mr. Dare's main point before the county court judge, as before us, was that this right of the wife came to an end after the matrimonial offence, and he relied on the passages which I have read. We were referred to the case of *Brown* v. *Brash*,[12] but as that case was not dealing with the position of a wife who has a special position I do not think it really assists. I will accept, for the purposes of this appeal, that a matrimonial offence would, if the husband was so minded, entitle the husband to revoke the licence under which a deserted wife can claim the protection of the Rent Restriction Acts on the ground that her occupancy was her husband's occupancy. If there was a withdrawal of that licence, as a result of this matrimonial offence, and there was satisfactory evidence from which it could be inferred (as I think it could probably be inferred in the present case) that he did not intend to return, then I think the landlord would succeed. But that is as between the husband and wife. I do not myself think this matrimonial offence can be relied on by the landlord. The husband having taken no action to revoke, I think the position remains the same as it was in *Old Gate Estates Ld.* v. *Alexander*,[13] to which I have already referred. There was no evidence from the husband, and there was no evidence that he had left the country or that his whereabouts were unascertainable. Indeed, as I have said, the plaintiff had seen him since he bought in 1950. In my opinion, as she is still his wife and he has done nothing to revoke her licence, the conclusion that the county court judge came to, that the plaintiff was not entitled to possession, was right.

I think the same conclusion might be arrived at by reason of the fact that when the plaintiff bought he did so with full knowledge of the position, namely, that the husband had deserted, and he accepted the rent from the wife, the rent book being in the husband's name. It might well be said he accepted her occupancy as that of the tenant husband. The county court judge in his judgment was not satisfied that a matrimonial offence had been committed. I think it is clear on the evidence that there was evidence of an admission of a matrimonial offence by the wife, though, as I have said, there is no evidence as to

[12] [1948] 2 K.B. 247.

[13] [1950] 1 K.B. 311.

what attitude the husband took towards it. The learned judge did, in the last paragraph of his judgment, refer to the fact that the husband deserted his wife and left her, and he says the furniture in the house was his. It was submitted that there was no evidence as to the furniture being his, and though I think that is the natural inference I do not rely on it. For these reasons I think this appeal must be dismissed.

BIRKETT L.J. I am entirely of the same opinion. I think this judgment should be confirmed, and I agree fully with the decision on the two points which have just been enunciated by my Lord.

[His Lordship stated and commented on the facts and evidence, and continued:] The first point that Mr. Dare raised was that this wife had committed what he called a matrimonial offence; that she is what is sometimes referred to as a guilty wife. Assuming that she was a guilty wife, assuming that she had committed a matrimonial offence, I cannot see what the landlord has to do with it. I can see how much the husband should have to do with it. Indeed, Mr. Dare based his case really upon this point: once the matrimonial offence is proved then the rights of the husband in respect of that matter come into being and he can exercise them. He is no longer responsible for her, she cannot pledge his credit for necessaries, and all sorts of things. Mr. Dare said by that same token her right to remain in the premises comes to an end. I do not think it does. I think it is irrelevant, so far as the landlord is concerned. It is a matter entirely between the husband and the wife. But upon the other point, namely, that the course of conduct in this case was such that the landlord had accepted the personal occupancy of the wife as equivalent to the occupancy of the husband, I do not entertain very much doubt. In the sixth edition of Megarry, at page 155, he concludes a discussion of the cases and says: "Such "decisions present obvious theoretical difficulties, but a satis-"factory result can perhaps be supported (at all events between "the original parties) on the ground that by their agreement the "parties have made occupation by the daughters or the manager "equivalent to personal occupation by the tenant." And in this case in 1950 the plaintiff knew the facts. He knew the wife was in possession. He knew the husband was then in Leicester. He had lived two doors away for most of his life and he knew the exact position when he bought the premises. His wife, Mrs. Wabe, who collected the rents, gave evidence that she said to the wife, "What name shall I put on the rent book?" and the wife said "Mr. Taylor." And so Mr. Taylor appeared on the rent book. The defendant paid the rent and fulfilled all the obligations for all that time. I think myself, the last paragraph of the judgment of the county court judge really sums this matter up when he said: "The evidence is that the husband "deserted his wife, leaving her and the furniture in this house. "He has not put forward any defence to these proceedings. As "far as I am aware he takes no part in them. He has made no "attempt to surrender the tenancy, which he still has, and I "think, therefore, this claim has failed." I agree that this appeal ought to be dismissed.

HODSON L.J. The plaintiff is the landlord of a house, 131 Norwich Road, Wisbech, and his case was that the first defendant, the husband, had abandoned possession of the premises and that the wife, the second defendant, remained on the premises as a trespasser. Accordingly, he claimed possession against them. The county court judge held that assuming that the second defendant would have been entitled to remain on the premises as her husband's agent, within the principles of *Middleton* v. *Baldock*,[14] only so long as she behaved herself, and that her adultery determined such right, there was no evidence of adultery. With respect to the county court judge, I think he misdirected himself in holding that there was no evidence of adultery. There was evidence that she stated a child was born to her which was a child of the lodger. That, the county court judge said, would have the effect of bastardizing the child, and in the absence of evidence of non-access he would not find adultery. I think he was wrong there, because proof of adultery was quite an independent matter and could be established by admission without proof of non-access. After all, admission in which a woman says a child is not her husband's is not the kind of statement which is on the face of it likely to be untrue.

Mr. Dare, starting from the proposition that he had established adultery, as I think he was entitled to do, argued that he was entitled to say that the second defendant, having committed adultery, was no longer entitled to say, either as against her husband or the landlord, that her possession was the possession of her husband. He relied on *Middleton* v. *Baldock*, and particularly the passage in the Master of the Rolls' judgment [15] in which he said: "If the wife had wronged the husband; or if, though she "was not the guilty party, an appropriate court, on the husband's "application, had ordered the wife to go out, then her right to "be lawfully there would, of course, have come to an end." Mr. Dare said that the landlord was entitled to possession because possession had been abandoned by the tenant who had no intention of returning. He relied on *Brown* v. *Brash*,[16] to which my Lord has referred, as showing that the tenant must prove both corpus possessionis and animus possidendi in order to avoid the result of the position in *Skinner* v. *Geary*,[17] also a decision of this court. He says there was here no animus possidendi in the tenant himself and the inference in favour of the second defendant that she was in lawful possession could only be drawn so long as she was rightly there as against her husband.

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[14] [1950] 1 K.B. 657.

[15] Ibid. 662.

Mr. Widgery conceded that that would be the case if the husband (the first defendant) could prove that he had revoked his wife's licence to remain on the premises by reason, as in this case, of her adultery, since she would, therefore, not be in a position to assert that her position was that of an agent of necessity or anything analogous thereto. Mr. Widgery went on to say, however, that the wife's conduct becomes relevant only if the husband seeks to revoke the licence, and that if the possession is lawful vis-à-vis the husband it is lawful vis-à-vis the landlord. He pointed out that here there was no evidence that the husband ever revoked the licence, and he contended that there was no reason to treat the wife as a wrongdoer when the husband had not done so.

I think that contention is well founded. It is well established that in an action against the husband he would be entitled to set up his wife's adultery as a defence to a claim by a plaintiff who had provided his wife with such necessaries. *Govier* v. *Hancock*[18] is authority for that proposition, if authority is necessary. This does not involve the proposition that a landlord is entitled to rely on a matrimonial offence which the husband does not himself set up. As my Lord pointed out in the course of the argument, the husband might have condoned the adultery. I think that the husband not having revoked the wife's licence he remains in possession through her and this is so whether or not there is locked in his bosom the intention to return. I think, therefore, the judgment of the county court judge can be sustained on that ground.

[16] [1948] 2 K.B. 247.

[17] [1931] 2 K.B. 546.

[18] 6 T.R. 603.

There is a further ground which Mr. Widgery put forward in argument, and that is that the landlord was aware of the position at the time he bought the premises. The husband's name was in the rent book but the rent was always paid by the wife, and I think the landlord has accepted the occupancy of the wife as that of the husband throughout. On this ground also I think the judgment of the county court judge can be sustained. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co., for Ollard, Ollard & Sessions, Wisbech; Metcalf, Copeman & Pettefar.*

A. W. G.

GARDNER v. AKEROYD.

1952
June 17, 27.

Lord Goddard C.J., Slade and Parker JJ.

Criminal Law — Attempt — Act preparatory — Absolute prohibition against substantive offence—Vicarious liability—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927), *reg.* 90 (1), *reg.* 55AB—*Meat (Prices) (Great Britain) (No.* 2) *Order,* 1951 (*S.I.* 1951, *No.* 1313).

The doctrine of a master's criminal responsibility for his servant's breach of an absolute duty or prohibition imposed by statute does not extend to make the master vicariously liable for his servant's attempt to commit or his servant's act preparatory to the commission of an offence against the Defence (General) Regulations.

Case stated by Morecambe and Heysham justices.

The justices dismissed 33 informations preferred by the prosecutor against the defendant Akeroyd alleging that he did acts preparatory to the commission of an offence against regulation 55AB of the Defence (General) Regulations, 1939.

The following facts were proved or admitted before the justices. The defendant was a butcher carrying on business at Morecambe and employed the defendant Mugliston as an assistant. On November 1, 1951, two Ministry of Food inspectors visited the shop and found 41 parcels of meat made up ready for delivery bearing price and name tickets. In the case of 33 of the parcels, the ticket disclosed overcharges contrary to article 2 of the Meat (Prices) (Great Britain) (No. 2) Order, 1951, made under regulation 55AB of the Defence Regulations. The parcels and tickets had been prepared by Mugliston in the absence of Akeroyd. Akeroyd and Mugliston were charged in respect of each of the parcels under regulation 90 (1) of the Defence Regulations,[1] which made it an offence to do any act preparatory to the commission of an offence against any of the regulations.

Mugliston was convicted, but the informations against Akeroyd were dismissed.

The prosecutor appealed in respect of the informations against Akeroyd.

J. P. Ashworth for the prosecutor. The master, Akeroyd, is vicariously liable for his servant's act preparatory to the offence of selling meat at prices in excess of those applicable. The prohibition against overcharging on sales of meat is an absolute one, and accordingly the master would have been liable if his servant had been in breach of article 2 of the Meat (Prices) (Great Britain) (No. 2) Order, 1951, that is, if the meat had actually been sold: *Quality Dairies (York) Ld.* v. *Pedley*[2] and *Linnett* v. *Commissioner of Metropolitan Police.*[3] The fact that the servant committed only an act preparatory to the commission of an offence against the Defence Regulations and not the substantive offence makes no difference to the master's liability; the servant was in breach of an express statutory provision which it is submitted contains an absolute prohibition.

[LORD GODDARD C.J. Surely the doing of an act preparatory to the commission of an offence implies knowledge on the part of the person who does the act?]

Knowledge is not necessary. Parliament has placed on the seller of meat an absolute duty not to allow even an act preparatory to the sale of meat at excessive prices. The results of this legislation may be startling in that it is possible that a master who, finding that his servant has committed an act preparatory to an offence against the regulations, steps in and prevents an illegal sale, is still liable for his servant's preparatory act. The explanation is that regulation 90 of the Defence

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[1] Defence (General) Regulations, 1939, reg. 90 (1): "Without prejudice to the operation of section 5 "of the Summary Jurisdiction Act, "1848, and section 8 of the Accessories and Abettors Act, 1861, any "person who attempts to commit, or "does any act preparatory to the commission of, an offence against any "of these regulations, shall be guilty "of an offence against that regulation."

[2] [1952] 1 K.B. 275.

[3] [1946] K.B. 290.

Regulations was intended to be very severe, its object being not to penalise shopkeepers but to protect the public.

R. J. S. Harvey for the defendant Akeroyd. The justices arrived at the right conclusion through the wrong considerations. The principle laid down in *Linnett* v. *Commissioner of Metropolitan Police* [3] applies only where it is established that Parliament has created an absolute obligation or prohibition; but here only the unlawful sale of meat at an excessive price is absolutely prohibited, not an act preparatory to such a sale. The doctrine of vicarious liability should not be extended to this type of offence which is unknown to the common law. Regulation 90 (1) achieves its object without the necessity for construing it as containing an absolute prohibition against acts preparatory to an offence.

[PARKER J. Is a master vicariously responsible for his servant's attempt to commit an offence which is absolutely prohibited?]

No. It is submitted that there is only an absolute prohibition against committing the substantive offence and not against an attempt or an act preparatory, and that, accordingly, the master in the present case was not liable for his servant's act preparatory.

Ashworth in reply. Assuming in the defendant's favour that an attempt requires the element of knowledge or intent, there is a distinction between that and an act preparatory to the commission of an offence. There appears to be no authority on the point whether a master is vicariously liable for his servant's attempt to commit an absolutely prohibited offence.

[Counsel referred to *Reynolds* v. *G. H. Austin & Sons Ld.*, *per* Devlin J.[4]]

Cur. adv. vult.

June 27. The following judgments were read:—

PARKER J. This case raises again the question of how far and in what circumstances a master is vicariously liable for an offence committed by his servant. [His Lordship stated the facts and continued:] Article 2 of the Meat (Prices) (Great Britain) (No. 2) Order, 1951, provided that: "No person shall sell or buy by retail "any meat at a price exceeding the maximum price applicable "in accordance with the schedule to this order." It is clear, therefore, that if the parcels had been delivered offences would have been committed. Regulation 90 (1) of the Defence (General) Regulations, 1939, makes it an offence to do any act preparatory to the commission of an offence against any of the regulations, and accordingly the defendants Akeroyd and Mugliston were charged with that offence in respect of each of the parcels. Mugliston was convicted and does not appeal, but the informations against the defendant Akeroyd were dismissed, the justices evidently being of opinion that he was not vicariously liable for the offence committed by his servant.

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[3] [1946] K.B. 290.

[4] [1951] 2 K.B. 135, 149.

Whether or not a master is so liable depends on the true application to the facts of the case of the principle laid down by Atkin J. in the passage so often quoted in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[5]: "I think that the "authorities cited by my Lord make it plain that while prima "facie a principal is not to be made criminally responsible for "the acts of his servants, yet the legislature may prohibit an "act or enforce a duty in such words as to make the prohibition "or the duty absolute; in which case the principal is liable if "the act is in fact done by his servants. To ascertain whether "a particular Act of Parliament has that effect or not regard "must be had to the object of the statute, the words used, the "nature of the duty laid down, the person upon whom it is "imposed, the person by whom it would in ordinary circum"stances be performed, and the person upon whom the penalty "is imposed."

It is, I think, clear that if the parcels had been delivered Akeroyd would have committed the full offence of selling meat at a price exceeding the maximum price contrary to article 2 of the order. The prohibition in that article is absolute and it would have been no answer for Akeroyd to show that this had been done in his absence and without his knowledge and intent. It is contended on behalf of the prosecutor that the words in regulation 90 (1) equally import an absolute prohibition against doing an act preparatory to such a sale.

In considering the validity of this contention, it is important to remember the general rule referred to by Lord Goddard C.J. in *Harding* v. *Price*[6]: "The general rule applicable to criminal "cases is actus non facit reum nisi mens sit rea, and I venture "to repeat what I said in *Brend* v. *Wood*[7]: 'It is of the utmost "'importance for the protection of the liberty of the subject "'that a court should always bear in mind that, unless a statute "'either clearly or by necessary implication rules out mens rea "'as a constituent part of a crime, the court should not find a

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[5] [1917] 2 K.B. 836, 845.
[6] [1948] 1 K.B. 695, 700.
[7] (1946) 62 T.L.R. 462, 463.

" 'man guilty of an offence against the criminal law unless he has " 'a guilty mind.' In these days when offences are multiplied " by various regulations and orders to an extent which makes it " difficult for the most law abiding subjects in some way or at " some time to avoid offending against the law, it is more " important than ever to adhere to this principle."

Prima facie, therefore, the defendant commits no offence unless mens rea is present. Do the words constituting the offence expressly or impliedly rebut that presumption? They certainly do not do so expressly, nor in my view do they do so impliedly.

[His Lordship read regulation 90 (1) and continued:] So far as the two sections there referred to are concerned, knowledge and intent are necessary ingredients to constitute an offence. So far as an attempt is concerned, there again knowledge and intent are clearly necessary, whilst a conspiracy consists of an agreement to do an act which constitutes the substantive offence. In their context, therefore, it would be odd if the succeeding words imposed an absolute prohibition. Moreover, an act done immediately and not merely remotely connected with the commission of an offence constitutes an attempt, and accordingly the act which constitutes merely an act preparatory to the commission of an offence will be an act further back in the sequence of acts leading up to the substantive offence. If mens rea is necessary in the case of an attempt then it would, one would have thought, have been all the more necessary in the case of the doing of an act preparatory to the commission of an offence. Further, whether or not such an act is an act preparatory to the commission of an offence must, it seems to us, depend on intent. The purchase of a box of matches might or might not be an act preparatory to the commission of an offence of arson according to the circumstances and the intent.

The matter can also be approached by considering whether from the point of view of the protection of the public it is necessary to import an absolute prohibition. As was pointed out by Devlin J. in *Reynolds* v. *G. H. Austin & Sons Ld.*[8]: "It may " seem, on the face of it, hard that a man should be fined, and, " indeed, made subject to imprisonment, for an offence which he " did not know he was committing. But there is no doubt that " the legislature has for certain purposes found that hard measure " to be necessary in the public interest. The moral justification

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[8] [1951] 2 K.B. 135, 149.

"behind such laws is admirably expressed in a sentence by Dean "Roscoe Pound in his book, The Spirit of the Common Law, at "p. 52: see The Law Quarterly Review, vol. 64, p. 176: 'Such "'statutes,' he says, 'are not meant to punish the vicious will "'but to put pressure upon the thoughtless and inefficient to do "'their whole duty in the interest of public health or safety or "'morals.' Thus a man may be made responsible for the acts "of his servants, or even for defects in his business arrange-"ments, because it can fairly be said that by such sanctions "citizens are induced to keep themselves and their organizations "up to the mark. Although, in one sense, the citizen is being "punished for the sins of others, it can be said that, if he had "been more alert to see that the law was observed, the sin might "not have been committed. But if a man is punished because "of an act done by another, whom he cannot reasonably be "expected to influence or control, the law is engaged, not in "punishing thoughtlessness or inefficiency, and thereby pro-"moting the welfare of the community, but in pouncing on the "most convenient victim."

By treating article 2 of the order as creating an absolute prohibition, butchers, to adopt the words of Devlin J., are "induced to keep themselves and their organizations up to the "mark," and I see no necessity from the point of view of the protection of the public in going further and reading "the doing "of an act preparatory to the commission of an offence" against article 2 as importing an absolute obligation. Indeed, to do so would lead to the absurd result that if the butcher had arrived back in the shop before the parcels had been dispatched and had prevented their dispatch he would nevertheless have been guilty of the offence charged. In this connexion I would quote further from the judgment of Devlin J. in *Reynolds* v. *G. H. Austin & Sons Ld.*[9]: "I think it a safe general principle to follow (I state "it negatively, since that is sufficient for the purposes of this "case), that where the punishment of an individual will not "promote the observance of the law either by that individual or "by others whose conduct he may reasonably be expected to "influence then, in the absence of clear and express words, such "punishment is not intended."

Finally, it may be observed that what is made an offence is the doing of an act preparatory to the commission of any offence against the regulations, which latter offence may or may not be contrary to an absolute prohibition. The words in regulation 90 (1) cannot, as it seems to me, amount to an absolute prohibition in relation to one and not in relation to another substantive offence. To read the words as amounting to an absolute prohibition would lead to the absurd result that a master might be vicariously liable for an act done preparatory to the commission of an offence whereas he might not be so liable for the substantive offence itself.

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[9] [1951] 2 K.B. 135, 150.

In my opinion the justices came to a right conclusion, and this appeal should be dismissed.

LORD GODDARD C.J. I entirely agree with the judgment of Parker J., but as this case raises in my opinion a question of cardinal importance regarding the doctrine of vicarious liability in criminal law I will briefly express my own opinion. A master who is not particeps in the offence can only be liable criminally for the acts of his servant if the statute which creates the offence does so in terms which impose an absolute prohibition. Where the prohibition is absolute no question of knowledge or intent arises; the state of mind of the perpetrator is immaterial: *Bank of New South Wales* v. *Piper*.[10] But this does not mean that whenever an Act forbids something a master is liable if his servant does the act forbidden; it has to be decided as a matter of construction whether the Act imposes a liability on the master for the act of his servant, and the relevant considerations are to be found in *Mousell Brothers Ld.* v. *London and North Western Railway Co.*[11] If, for example, an Act forbids a sale of adulterated food, or of goods with a false trade description, or at a price in excess of a statutory maximum, the master will be liable notwithstanding that the sale was effected by his servant and without his knowledge, provided only that the sale was in the course of the servant's employment. The seller was the employer, and the offence was complete as soon as the goods were sold. A person can be guilty of an offence if he does an act forbidden, if he aids and abets the commission of the offence, if he conspires with another to commit it, if he attempts to commit it and, in the case of an offence against the regulations, if he does an act preparatory to the commission of an offence. There is no doubt that the class of offence with which we are now dealing is one for which a master can be held vicariously liable. If a sale had taken place there is no doubt but that he could have been, and would have to be, convicted. To convict a person of aiding and abetting any offence, whether against a statute or these regulations or at common law, it has to be proved that he at least knew the essential fact or facts constituting the offence: see *Johnson* v. *Youden.*[12]

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[10] [1897] A.C. 383.

[11] [1917] 2 K.B. 836.

Leaving aside what it is necessary to prove in a charge of conspiracy to commit an act absolutely prohibited, we now come to the offences of attempting and of doing an act preparatory to the commission of an offence against the regulations. I am by no means clear about the difference between these two offences. The test as to what acts constitute an attempt was laid down by the Court for Crown Cases Reserved in *Reg.* v. *Eagleton*[13] in these words: "Acts remotely leading towards the commission of the "offence are not to be considered as attempts to commit it, but "acts immediately connected with it are." This has been followed as a safe guide by the Court of Criminal Appeal in numerous cases, of which *Rex* v. *Robinson,*[14] *Rex* v. *Woods*[15] and *Rex* v. *Bloxham*[16] are good instances. As these cases point out, it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt, and it may therefore be that it is intended to meet this difficulty by using the words "an act "preparatory to the commission of an offence" and so to embrace acts which are only remotely connected with the commission of an offence.

This may be desirable and necessary in time of war, but I venture to express the hope that it may be considered by the appropriate authority whether this should be continued in time of peace, as it is certainly extending criminal liability as regards these existing regulations beyond what exists in regard to other crimes, whether they be common law or statutory offences.

One thing must, I think, be certain, and that is that these words are intended to apply to what the law would regard as something less than an attempt. Now, applying the doctrine laid down in *Reg.* v. *Eagleton,*[17] I should have no hesitation in holding that the servant in this case was guilty of and could properly have been charged with an attempt, as the facts proved were clearly immediately connected with what would have been a substantive offence had not the enforcement officer intervened before the goods had been actually sold. Does, then, this doctrine of vicarious liability extend to an attempt? If it does not, it cannot apply to a mere preparatory act.

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[12] [1950] 1 K.B. 544.

[13] (1855) Dears. 515, 538.

[14] [1915] 2 K.B. 342.

[15] (1930) 46 T.L.R. 401.

[16] (1943) 29 Cr.App.R. 37.

[17] Dears. 515.

That it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended. Just as in former days the term "odious" was applied to some forms of estoppel, so might it be to vicarious liability. It makes a person guilty of an offence actually committed by another when he may have no knowledge that it was being committed or may have done his best to prevent it. There is no case to be found in the books where it has been applied to an attempt, and for my part I refuse so to extend and apply it. Were it to be applied the consequences might be startling and unjust in the highest degree. For once a servant had done an act amounting to an attempt his master would be vicariously liable though he had intervened and frustrated the commission of the substantive offence. Had the defendant Akeroyd discovered before the officer arrived what his servant had done, and immediately removed the price tickets and summarily discharged him, it could still have been said, if the doctrine applied, that he was guilty. To meet this it is said that in such a case there would be no prosecution, but that is no answer; the question, and the only question, is: Has the master committed an offence? If an offence is complete the doctrine applies, if the statute is one which calls for its application; but I see no ground for holding that because it will apply to a completed offence it must apply equally to an attempt, and every reason for holding that it does not.

Of course, if the master is a party to the attempt, no question of vicarious liability arises; he is just as guilty as the servant. It is with vicarious and not primary liability that we are dealing. And if the doctrine does not apply to an attempt still less does it apply to the vague and unsatisfactory offence of doing a preparatory act. The justices were right, and I agree that the appeal should be dismissed.

SLADE J. I entirely agree with both the judgments that have been delivered.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Hiscott, Troughton & Page, for Bannister, Bates & Son, Morecambe and Heysham.*

S. C.

C. A.

1952
July 2.

Somervell, Birkett and Hodson L.JJ.

BECK *v.* NEWBOLD.

[Plaint G. 2046.]

Landlord and Tenant—Rent restriction—Sublease—Apportionment of standard rent—Transfer of burden of repairs—Decision of county court judge—Whether final and conclusive—Appeal—Jurisdiction —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (3), (6)—*Rent and Mortgage Interest Restriction Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 11 (1).

The defendant N., having taken an assignment of the residue of the term of a lease of a dwelling-house under which the tenant covenanted to do full repairs, sublet to the plaintiff B. the top floor flat, the sublease containing no covenant by the subtenant to do repairs. Subsequently N. purchased the reversion of the lease and later the freehold of the premises. On an application by B. to the registrar of the county court for an apportionment of the agreed standard rent of the dwelling-house the registrar granted an amendment of the summons to include an application for a determination, under section 11 (1) of the Rent and Mortgage Interest Restriction Act, 1923, of the question whether N. was entitled to increase the standard rent in respect of the transfer to her, as landlord, of the burden of doing repairs. The county court judge, reversing the decision of the registrar, held that there had been no transfer of burden from B. to N. and refused leave to increase the standard rent. On appeal by N. it was contended for the sublessee B. that under section 2 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the decision of the county court judge was final and conclusive and the Court of Appeal had no jurisdiction to entertain the appeal:—

Held, that since the passing of the Act of 1923 there had been on the statute book two sections dealing with the subject matter of these proceedings. By section 2 (6) of the Act of 1920 the decision of the county court was declared to be final and conclusive, but section 11 of the Act of 1923, in the absence of such excluding provision, gave the ordinary statutory right to appeal. Whether that was intended or was an oversight by the legislature was not a matter with which the court was concerned. The proceedings having been taken under section 11 of the Act of 1923 the Court of Appeal had jurisdiction to entertain and allow the appeal.

APPEAL from Judge Sir Gerald Hargreaves, sitting at West London county court.

In 1932 a dwelling-house was leased for 21 years at a rent of £195 per annum, which it was agreed was the standard rent under the Rent Restriction Acts. That lease contained covenants under which the tenant had to do full repairs. In 1946 Miss Newbold moved into the first floor of the premises, and later took an assignment of the residue of the term of the lease. She therefore became liable, as lessee under the lease of 1932, to do the repairs. In 1950 Miss Newbold bought the reversion under that lease, and later the freehold. Meanwhile she had granted to Mrs. Beck a sublease of the top-floor flat at a rent of 17s. 6d. a week. The sublease contained no covenant by the sublessee to do repairs.

On November 15, 1951, Mrs. Beck applied to the registrar of the West London County Court for an apportionment of the standard rent under section 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. At the same time the registrar gave leave for the summons to be amended to include an application for the determination under section 11 of the Rent and Mortgage Interest Restrictions Act, 1923,[1] of the question whether Miss Newbold, having first as lessee under the lease of 1932 and now as owner to bear the burden of repairs formerly borne by the tenant, was entitled to increase the standard rent in respect of such transfer of burden. The registrar apportioned the standard rent and allowed an increase in respect of the transfer of burden.

On appeal to the county court judge he varied the apportionment of the standard rent, and disallowed any increase in respect of transfer of burden. He was of opinion that so far as the parties were concerned there had been no transfer of burden at all.

On appeal by the landlord against the decision of the judge in respect of the transfer of burden it was contended for the sublessee that the decision of the county court judge was final and conclusive and that the Court of Appeal had no jurisdiction to entertain the appeal.

The case is reported on the question of jurisdiction only.

Stephen Stewart for the landlord.

C. Hackforth-Jones for the sublessee.

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (6): "Any question arising under sub-"section (1), (2) or (3) of this section "shall be determined on the applica-"tion either of the landlord or the "tenant by the county court, and the "decision of the court shall be final "and conclusive."

Rent and Mortgage Interest Restriction Act, 1923, s. 11 (1): "The "county court shall have power on "the application of a landlord or a "tenant to determine summarily any "questions as to the amount of the "rent, standard rent or net rent of "any dwelling-house to which the "principal Act applies, or as to the "increase of rent permitted under "that Act or this Part of this Act."

SOMERVELL L.J., having held that on its merits the appeal succeeded, and the landlord was entitled to add to the apportioned standard rent a proportion of the estimated burden of the repairing covenant, continued:—I now come to the question of jurisdiction. Subsection (3) of section 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, deals with the increases allowed in respect of transfer of burden. Subsection (6) of section 2 provides that any question arising under subsections (1), (2) or (3) of this section shall be determined on the application of landlord or tenant by the county court, "and the decision "of the court shall be final and conclusive." In *Elvington Tenants Ld.* v. *Hatton* [2] a notice of increase purporting to increase the rent on account of the landlord's liability for repairs, and other grounds, came before the county court. The landlord applied under subsection (6) to determine the question whether the notice of increase was valid. It was held that "although "questions of law were involved in the matters submitted, the "terms of the statute made the decision of the county court final "and no appeal lay from it." It seems clear on the words of the subsection, but I thought it right to refer to that case.

In *Broomhall* v. *Property Agents and Owners Ld.*[3] an application was made to a county court judge to determine the standard rent. The Divisional Court held that: "The county court has no "jurisdiction under the Increase of Rent and Mortgage Interest "(Restrictions) Act, 1920, or the Rules of 1920 made thereunder "or otherwise to entertain an application to determine as a sole "and independent question what is the 'standard rent' of a "dwelling-house within the meaning of the Act." No doubt such a question may arise and be determined in the course of proceedings on a claim for rent or something of that sort, but the court held that there was no power to make an application simpliciter determining the standard rent.

It is suggested by counsel that that decision resulted in an amendment of the law. The law was undoubtedly amended so as to cover the gap that *Broomhall's* case [3] indicated had existed. Section 11 of the Rent and Mortgage Interest Restriction Act, 1923, provided as follows: "The county court shall have power "on the application of a landlord or a tenant to determine sum"marily any questions as to the amount of the rent, standard "rent or net rent of any dwelling-house to which the principal "Act applies, or as to the increase of rent permitted under that "Act or this Part of this Act." If it had been intended merely to fill up the gap disclosed by *Broomhall's* case,[3] that would have been done, and perhaps more than done, by the words which precede "or as to the increase of rent permitted under that Act "or this Part of this Act." There is—it is common ground—no dispute that whereas if a party proceeds under section 2 (6) the decision of the county court is final, but if he proceeds under section 11 (1) there are no words which cut out the ordinary statutory right of appeal.

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[2] (1928) 139 L.T. 211.

[3] [1922] 1 K.B. 311.

We were referred to a provision in the Act of 1923 dealing with notices, but I do not think that really assists. We were also referred to the provisions in the Landlord and Tenant (Rent Control) Act of 1949 where the matters dealt with in section 8 (4) are under section 8 (9) to be determined on application by the county court, and the decision of the court is to be final and conclusive. I do not myself derive much assistance from that, because the difficulty (and I think there is a difficulty) seems to me to arise on the legislation as it was after the passing of the Act of 1923. There was then on the statute book one section, section 2 (6) of the Act of 1920, which said: "Any question "arising under subsection (1), (2) or (3) of this section"—those undoubtedly are questions as to the increase of rent permitted under the Act of 1920—"shall be determined . . . by the county "court and the decision of the court shall be final and conclusive," and there was also section 11 of the Act of 1923 which said also that any question as to the increase of rent permitted under that Act, i.e., the Act of 1920, could be determined on application, and on such application, there being no words excluding a right of appeal, there would be a right of appeal. I think to a very large extent, therefore, there was an overlap, and there were two procedures in respect of the same subject-matter which an applicant could pursue, one which entitled an unsuccessful party to appeal from a decision of the county court, and one which did not. Whether that was intended or was an oversight is a matter with which I do not think myself we are concerned. The last words of section 11 of the Act of 1923 seem to me to make it impossible to contend that a question as to an increase of rent under section 2 (3) of the Act of 1920 is not a matter which may be raised on application under section 11. I think this matter must in this case be treated as having been raised by way of application under that section, because it was on the basis of an application under that section that the registrar, according to the notes of his judgment, allowed the matter to be raised. For

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[3] [1922] 1 K.B. 311.

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those reasons I think that the objection that no appeal lies fails, and for the reasons which I have given on this, at any rate to me, rather intricate matter, and on the actual facts, I have, with respect, come to a different conclusion from that to which the county court judge came. In my opinion the appeal should be allowed.

BIRKETT L.J. I am of the same opinion and I can conclude what I have to say in a very few sentences. There were two matters to be determined in this case and with both of them my Lord has just dealt very fully. On the first matter, which I will call the merits, I do not really desire to add anything to what my Lord has said. I think the decision that the appeal should succeed and that the estimated amount of this contractual liability should be taken into account is proper and right and I have no more to say upon that matter.

I would like to add one word on the point as to jurisdiction. Like all matters which come to this court dealing with the Rent Restriction Acts, however simple the point may appear to be, it is almost always surrounded by a very thorny and complicated, or, as my Lord has said, a most intricate, state of facts. In this case the decision as to jurisdiction, I think, is fairly simple. In the ordinary way decisions under the Rent Restriction Acts in the county courts can be appealed in the usual way to the Court of Appeal. The only exceptions to that general rule are specific. My Lord has dealt with them all, but perhaps I may just make this reference to them for my own purpose. [His Lordship referred to sections 2 (6) and 12 of the Act of 1920; the Notices of Increase Act, 1923, and section 8 (4) of the Landlord and Tenant (Rent Control) Act, 1949, and continued:] These are the only statutory exceptions to the general rule and are specifically set out.

There is no question in this case, I think, that these proceedings come before us, as they came before the registrar, by virtue of section 11 of the Act of 1923, because the registrar in a written judgment says: "When the application was called on, I was "asked by counsel for both applicant and respondent to determine "the further question as to what was the recoverable rent of the "applicant's premises. I gave leave for the summons to be "amended to include an application for the determination of the "recoverable rent under section 11 of the 1923 Act." So in the plainest possible terms the registrar is saying: "That is the "section under which I acted."

As my Lord has already pointed out, certainly one of the governing reasons for the passing of this section was the decision of the Divisional Court in *Broomhall* v. *Property Agents and Owners Ld.*[4] Section 11 (1) of the Act of 1923 is really very wide. [His Lordship read the subsection and continued:] No word is there said, in 1923, that a decision of the county court on any one of those questions shall be final and conclusive. The registrar, when confronted by the parties and asked to determine this particular question, which was not in the original application, expressly states: "I will do it because of the power given by "section 11 of the Act of 1923." It may very well be, as my Lord said, there is here some little overlapping. It would not be a very surprising thing in Acts of this complexity and this range, covering so many areas and so many subjects, if some such overlapping does exist. But whether that is so or not, it seems to me to be fairly plain that here was power exercised by the registrar, in the first place, under section 11 of the Act of 1923, and there are no words of limitation to say that that decision or any decision made by the county court shall be final. I think, therefore, the point on jurisdiction fails, and I agree with the judgment announced by my Lord.

Hodson L.J. I have found the question of jurisdiction a difficult one, but I have arrived at the same opinion as my Lords. The application before the registrar purported to be an application under section 11 of the Act of 1923, which has been read, and it is in very wide terms. I think nothing would be gained by my referring again to the sections of the Act of 1920 which produce the difficulty. It is sufficient to say that, reading section 11 by itself, it clearly covers this case and does not restrict the right of appeal.

On the main question I agree with my Lords and also with the registrar who came to the conclusion that this case was covered in principle by the decision of the Court of Appeal in *Winchester Court Ld.* v. *Miller*,[5] expressly approved by more than one of their Lordships in the House of Lords in *Asher* v. *Seaford Court Estates.*[6]

Appeal allowed.

Solicitors: *Oswald Hanson & Smith; L. O. Glenister & Sons.*

A. W. G.

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[4] [1922] 1 K.B. 311.
[5] [1944] K.B. 735.
[6] [1950] A.C. 508.

1952
June 17, 27.

Lord Goddard C.J., Hilbery, Slade, Devlin and Parker JJ.

REGINA *v.* MIDDLESEX QUARTER SESSIONS (CHAIRMAN) AND OTHERS.
Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

Crown Practice—Certiorari and mandamus—Quarter sessions—Plea of Not Guilty—Chairman's improper remarks in presence of jury—Direction to jury to acquit given before any evidence called—Acquittal—Irregularity—Not a mistrial—Certiorari inapplicable.

The defendant pleaded not guilty at quarter sessions to a count in an indictment alleging that he had driven a motor car while under the influence of drink. While the jury were in the box waiting to be sworn the chairman told prosecuting counsel that he had read the depositions very carefully and did not think that any jury would convict. On prosecuting counsel's submission that there was evidence to go to the jury, the chairman ordered that the jury be sworn, saying that in any case he would give them his view of the matter. After prosecuting counsel had opened the case, the chairman made certain remarks of a similar nature to the jury, indicating that it would be a waste of time for them to hear any evidence and that the defendant should be acquitted; and before any evidence was called he asked the jury whether they wished to hear any evidence. The foreman of the jury said that they did not and a verdict of "not guilty by direction" was entered.

On the Director of Public Prosecution's application for an order of certiorari to bring up and quash the acquittal and for an order of mandamus directing quarter sessions to try the defendant according to law:—

Held, that the court could order a retrial only if there had been a mistrial with the result that the whole proceedings had been a nullity and had the record been drawn up the error would have been apparent; that there had been no mistrial of the defendant as he had been properly arraigned and the jury sworn to try him, so that he had technically been in peril of being convicted; and that as the jury had returned a verdict of not guilty, however improperly it had been obtained, the court had no power to order a new trial and the applications were refused.

APPLICATION for orders of certiorari and mandamus.

The Director of Public Prosecutions applied for an order of certiorari to quash the acquittal of a defendant, recorded by Middlesex quarter sessions on May 7, 1952, on a count in an indictment of driving while under the influence of drink, and for an order of mandamus directing quarter sessions to try the defendant on that count.

The following appeared from depositions taken in the petty sessional court. Another motorist deposed that on March 24, 1952, he had been driving in the same direction as the defendant, who was in front of him, and had seen the defendant's car swerving across the road, though there was nothing to make it swerve. A police-sergeant, who was in a police car travelling in the opposite direction, stated that at 12.10 a.m. he had seen the defendant's car swerve across the road and strike the kerb twice; that he stopped the defendant's car and that the defendant had stepped into the roadway, being very unsteady on his feet, and holding on to the car door for support; that his breath had smelt very strongly of liquor, his face was flushed, and his speech was slurred; and that when asked to switch off the engine of his car the defendant released his hold on the door and fell forward on to the driving seat, whereupon he was arrested.

The defendant was committed for trial on two charges: (1) driving under the influence of drink; and (2) driving in a manner dangerous to the public. On arraignment before Middlesex quarter sessions, he pleaded not guilty to count (1) and guilty to count (2).

He was acquitted on the first count after certain comments by the chairman, and fined £25 on the second count. His licence was not suspended.

In substance the ground on which the orders were sought was that the defendant had never been tried on the indictment and that the chairman, without any evidence having been called or given, had directed or procured the jury to return a verdict of not guilty so that the trial was in effect a nullity.

Sir Lionel Heald A.-G., *A. Melford Stevenson Q.C.* and *J. H. Buzzard* for the Director of Public Prosecutions. The course which the chairman took was wholly irregular and the question which arises is what can be done to remedy the irregularity. There can, of course, be no question of a new trial if there really was an acquittal: *Benson* v. *Northern Ireland Road Transport Board*[1]; but here there was no real trial according to law and consequently no acquittal. The applicant is merely seeking to have the record of the proceedings corrected.

There is no precedent in such a case as this. In *Rex* v. *Wandsworth Justices; Ex parte Read*,[2] this court granted an order of certiorari where justices did not allow evidence to be given on behalf of the defendant, who was convicted. It is submitted that the Crown is entitled to the same remedy as is the defendant where the court refuses to allow the Crown to call evidence. *Rex* v. *Wandsworth Justices*[2] shows that certiorari will lie where proceedings have become wholly irregular. *Rex* v. *Kingston-upon-Hull Rent Tribunal; Ex parte Black*[3] concerned an application for certiorari by a landlord where a tribunal had made an order against him without hearing any evidence on his behalf. The court held that there had been a complete failure of justice and granted the order. *De Freville* v. *Dill*[4] is analogous to the present case, except that it concerned a civil action. In *Fletcher* v. *London and North Western Ry. Co.*[5] the Court of Appeal held that at the trial of an action a judge could not, after the case had been opened, non-suit the plaintiff without his consent and without hearing the evidence tendered by him, and that a plaintiff so treated was entitled to a new hearing. It is submitted that the same principle applies in a criminal case where after opening the case the prosecutor is anxious to call evidence but is not allowed to do so.

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[1] [1942] A.C. 520.

[2] [1942] 1 K.B. 281.

It will be suggested here that as the defendant secured an acquittal, no new trial can be granted on the principle nemo debet bis vexari; but that maxim only applies where the defendant would have been legally twice in peril of being convicted of the same offence. It does not apply where the first trial was a mistrial so that the defendant could not have been legally convicted and therefore had not really been in peril: *Rex* v. *Marsham; Ex parte Pethick Lawrence*,[6] which was referred to in *Bannister* v. *Clarke*.[7]

Rex v. *Simpson*[8] is the authority which is closest to the present case. In that case an order of certiorari on the application of the prosecutor was refused where, although there had been irregularity in the constitution of the court, the defendants had been acquitted. The Divisional Court considered that the defect in the constitution of the court rendered the proceedings merely voidable but not void, and that certiorari would not lie as the defendants had been in peril. It is submitted that the proceedings in the present case rendered the trial void, so that the defendant has never yet been in peril of conviction: see *Crane* v. *Director of Public Prosecutions*,[9] *per* Lord Sumner[10] and Lord Parmoor.[11] In *Crane* v. *Director of Public Prosecutions*,[12] approval was given to *Regina* v. *Yeadon and Birch*,[13] where the chairman refused to accept the jury's verdict of common assault and ordered them to reconsider their verdict.

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[3] [1949] W.N. 51; 65 T.L.R. 209.

[4] (1927) 43 T.L.R. 431.

[5] [1892] 1 Q.B. 122.

[6] [1912] 2 K.B. 362.

[7] [1920] 3 K.B. 606.

[8] [1914] 1 K.B. 66.

[9] [1921] 2 A.C. 299.

[10] Ibid. 332.

[11] Ibid. 335.

[12] [1921] 2 A.C. 299.

[13] (1861) 9 Cox C.C. 91.

That was held by the Court of Criminal Appeal to amount to a mistrial and a venire de novo was awarded. *Regina* v. *Yeadon and Birch*[13] shows that proceedings may amount to a nullity and be void although the record of the court may be in order.

A new trial can only be given where there has been a mistrial, in the sense that the trial has been a nullity from the outset: *Rex* v. *Neal.*[14] The remedy of certiorari is a very special one and it is for the court to decide whether it is applicable in the present circumstances. The applicant submits that the true view is that there is ground for interfering with the acquittal which the defendant secured, that the proper remedy is by way of certiorari in order to correct the record of quarter sessions which records a verdict of not guilty although it was arrived at in circumstances so irregular as to make the whole proceedings void.

H. B. H. Hylton-Foster Q.C., *F. H. Lawton* and *Robin Day* for the Middlesex justices. The justices do not seek to oppose these applications, but it is submitted that if the Attorney-General's argument is accepted there is still no necessity for the issue of mandamus. The applicant seeks to bring before this court a record which purports to show a verdict of not guilty but which was in fact obtained under the chairman's direction; and that entitles the court to look ab extra to see whether there has been some excess of jurisdiction on the part of the inferior court. Here there was an excess of jurisdiction as quarter sessions had in law no power to accept or record the jury's verdict, given as it was before any evidence was called and in spite of the prosecutor's desire to call evidence. The effect of the chairman's direction was to require the jury to depart from their oaths; and the lack of jurisdiction was so flagrant as to make the whole trial a nullity. The defendant has, therefore, been committed for trial but has not yet been tried according to law and there is consequently no occasion for the issue of mandamus.

James Burge for the defendant. The applications should be refused as there is no remedy for irregularity at a trial where there has been an acquittal. The scope of the order of certiorari is set out in Halsbury's Laws of England, 2nd ed., Vol. 9, para. 1431 at p. 844.

The rule that a defendant should not be twice put in peril for the same offence has always been held sacred in English law: *Rex* v. *Marsham; Ex parte Pethick Lawrence*[15]; and *Regina* v.

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[13] (1861) 9 Cox C.C. 91.

[14] [1949] 2 K.B. 590.

[15] [1912] 2 K.B. 362.

Russell,[16] where Lord Campbell C.J. said[17]: "I . . . reprobate "the recent speculations as to the propriety of granting a new "trial after acquittals for felony and murder. If there be an "improper conviction, it should be set aside; but I hope the "same practice will never prevail in the case of an acquittal." In *Regina* v. *Duncan*[18] the defendant was acquitted on an indictment for obstructing a highway and it was held that a new trial on the grounds of, among other things, misreception of evidence and misdirection could not be granted.

As to the matter of jurisdiction which has been raised, *Rex* v. *Neal*[19] makes clear the grounds on which a venire de novo will be given, and see *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Kendal Hotels Ld.*[20] and *Rex* v. *Minister of Health; Ex parte Glamorgan County Mental Hospital Committee.*[21] An old authority on the power of a jury to stop a case before all the evidence has been called is *Regina* v. *Bird.*[22]

Sir Lionel Heald A.-G. in reply. The applicant relies on *Rex* v. *Wandsworth Justices; Ex parte Read*[23] as being the most helpful authority and as showing that certiorari will lie where there has been an excess of jurisdiction. In *Reg.* v. *Gillyard*[24] it was said that courts should not hesitate to extend the scope of certiorari provided that the mischief was apparent; and the decision there was followed in *Rex* v. *Recorder of Leicester.*[25]

Cur. adv. vult.

June 27. Lord Goddard C.J. [reading the judgment of the court]:—In this matter Mr. Attorney moves for an order of certiorari to remove into this court and quash the purported acquittal of the defendant, Peter Edward Bromley-Martin, recorded by the court of quarter sessions for the County of Middlesex on May 7, 1952, and an order of the court discharging the defendant on the first count of an indictment against him alleging that on March 24, 1952, when driving a motor-vehicle on Watford Way at Edgware he was under the influence of drink to such an extent as to be incapable of having proper control of the motor vehicle; and for an order of mandamus that quarter sessions do try the defendant on this count. In substance, the ground on which the orders were sought was that the defendant had never been

[16] (1855) 3 E. & B. 942.

[17] Ibid. 950.

[18] (1881) 7 Q.B.D. 198.

[19] [1949] 2 K.B. 590.

[20] (1947) 63 T.L.R. 239.

[21] [1939] 1 K.B. 232.

[22] (1850) 5 Cox C.C. 1, 9, 20.

[23] [1942] 1 K.B. 281.

[24] (1848) 12 Q.B. 527.

[25] [1947] K.B. 726.

tried on the indictment and that the chairman, without any evidence being called or given had directed or procured the jury to return a verdict of not guilty so that the purported trial was in effect a nullity.

The Attorney-General described the application as unprecedented, and certainly the facts are such that the court hopes that nothing like them have ever occurred before or will ever occur again.

The defendant had been committed for trial on two charges. One, to which we have already referred, was driving under the influence of drink. The second was driving in a manner dangerous to the public, and on arraignment he pleaded not guilty to count one and guilty to count two. The chairman said to Mr. Buzzard, who was prosecuting on the instructions of the Commissioner of Police, "I have read the depositions very carefully. I do not think any jury would convict him on the first charge. I say that at once." To that Mr. Buzzard replied: "I have certain instructions in this matter, my Lord. My instructions are to proceed on that count, because in the view of my instructing solicitor, and, indeed, in mine, there is evidence upon that count fit to be considered by the jury." The chairman then said: "All right. Let the jury be sworn. I shall give them my view of it, anyway."

At this time jurymen were already in the box waiting to be sworn, and they heard the dialogue which I have mentioned. It is difficult to understand how the chairman could suppose that they could fairly and impartially try a case after hearing him express the opinion, formed, as he said, after reading the depositions very carefully, that he did not think any jury would convict; and in saying that he proposed to give them his view of it he obviously meant that he was going to tell the jury that in his opinion they ought not to convict. As the chairman said that he had read the depositions very carefully, we propose to state what those depositions disclose. It appears from them that the defendant was driving along the Watford by-pass in the direction of Edgware. The deposition of a Mr. Axell was to the effect that he was driving in the same direction as the defendant who was in front of him. The latter's car was swerving across the road. It went over to the wrong side, came over to its own side, hit the grass verge, went up on to the kerb and on to the verge for about a foot. There was nothing in the road to make it swerve and, seeing another car coming in the opposite direction, which in fact turned out to be a police car, the witness put on his brakes as he anticipated an accident.

Police-sergeant Joyner stated that at 12.10 a.m. he was in a police car and saw the defendant's car coming towards him travelling north. He saw it swerve across the road and strike the kerb on the near side as the police were driving and therefore on the defendant's off side. The car straightened out after striking the kerb, and the driver of the police car slowed down and pulled right in to his near side. Just before the defendant's car reached them it swerved over, narrowly missing the off side of the police car and then went straight across the road striking the near side kerb. The front near side wheel of the car mounted the verge and continued swerving as it went down the road. The police car turned, caught up with the defendant and stopped him. The sergeant went to the car and asked the defendant to get out. He stepped into the roadway and was very unsteady on his feet and he held on to the door of the car for support. His breath smelt very strongly of liquor and his face was very flushed. The officer asked him if he was ill and he said: "Never felt better." His speech was very slurred. The sergeant asked him to switch off his engine, and releasing his hold on the car door to do so the defendant fell forward on to the driving seat. He was arrested and taken to Edgware police station where he arrived at 12.18 a.m.

He was told that the police proposed to have him medically examined and he was asked if he desired a private doctor. At that time he declined the offer. The police doctor examined the defendant from about 12.25 a.m. to 1 o'clock, and when the examination was over the defendant asked for a private doctor, but one could not be found till about 2.25 a.m. In cross-examination the officer said that the defendant struck the kerb on two occasions, that when the defendant fell forward he lifted him up and it was a police officer who switched the engine off. The police doctor gave evidence, but it is unnecessary to set out at length the symptoms to which he deposed. He came to the conclusion that the defendant was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor-vehicle. In cross-examination he said that he was not very drunk, that he did not consider it to be a bad case, that it was a borderline case but over the border. Notice of additional evidence had been served on the accused which was corroborative of the police-sergeant's evidence, and I need not therefore set it out.

It is indeed difficult for this court to understand how the chairman could have thought that there was nothing for the jury to consider on the drink charge. No explanation had been offered why the defendant was driving in the way that he was. That he was driving dangerously there was no doubt, for he pleaded guilty, and if he was not under the influence of drink what possible explanation could there be? If that is the way in which the defendant drives when he is sober, he is a public danger of the worst description and should be disqualified for life, or at least for a long period; although, as will be seen hereafter, the court refrained from imposing any disqualification at all. From first to last no explanation was ever given, either before the magistrates or before the sessions, by the defendant, who gave no evidence as to why he was driving in the way that he was.

The chairman, having expressed the view that he did, prosecuting counsel very properly insisted on opening the case and proceeding with the prosecution. He opened the facts which we have mentioned, and in addition described in fuller detail the symptoms found by the doctor on his examination. When the opening was finished and before any evidence was called, the chairman interposed and said to prosecuting counsel: "I cannot, "of course, say there is no evidence, but look at that hand-"writing." The exhibits he handed to counsel were those written by the defendant during his examination by the doctor. At this time, of course, they had not been proved but had been referred to by prosecuting counsel in his opening address. The chairman said: "Let the jury look at it. It is extremely good. "Just look at it, members of the jury. That is handwriting "which, it is suggested, is the handwriting of a man under the "influence of drink. It is a matter entirely for you, but I think "it is just sheer waste of time for you to consider it. But the "other charge you have not got to consider because he has "pleaded guilty to it."

Perhaps it is only fair to say that Mr. Buzzard had said that the writing appeared to be quite satisfactory, but apparently neither he nor the chairman had noticed that the defendant, who is apparently a man of some position and education, spelt "Suffolk" with two "l's" in one exhibit and "Woodbridge" with two "b's" in the other, which would seem perhaps to call for some little explanation. When the exhibits were handed to the jury they had not been proved and no question had been asked about them. Mr. Burge, who was appearing

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for the defendant, then said: "My learned friend did not "open and did not say that the private motorist also saw and "spoke with the accused and noticed nothing about him." I am sure that Mr. Burge did not mean to overstate the effect of the witness's evidence, but if he was referring to Mr. Axell, who was the only private motorist called, I cannot see in his deposition that he said he spoke to the accused. What he did say was that he saw him speak to the police. He was speaking rather slowly "but nothing else about him attracted my attention." He does not seem to have had any conversation with the accused himself or to have done more than observe him speaking to the police.

The chairman then continued: "I have read the depositions "carefully, and that is why I expressed the view I did. I have "no desire that your client's time should be wasted unnecessarily, nor, I may add, mine." If the chairman had read the depositions carefully it is all the more difficult to understand why he expressed this view. He went on: "I should have thought, "members of the jury, that as far as that charge is concerned, "you can consider that as being answered by that handwriting, "at least. In other words, he is not guilty of that; but we can "deal with him, of course, on the dangerous driving charge to "which he has pleaded guilty. On that opening and on that "document, I have to ask you: do you want to hear the evidence "on that charge? You observe from the handwriting that he "lives at Woodbridge in Suffolk, which might quite easily "explain why he did not know where he was. Mr. Foreman, "do you want to hear any evidence on the drink charge?"

The foreman of the jury then said: "Under your direction, I "should say no, my Lord." The chairman said: "Is that the "verdict of you all?" and the foreman said: "Yes, that is so." The chairman said: "Then he will be found not guilty on that "charge," and the court then conferred and announced that he would be fined £25 and that they did not propose to suspend his licence. Having thus imposed a quite inadequate penalty, the chairman continued: "Obviously, he is a man who must take "care about his driving, having regard to the fact that he is an "injured man. He should be particularly careful not to involve "himself in anything which looks like danger."

I think that it is unnecessary to comment on such observations as those, but to suggest to the jury that because he lived at Woodbridge was a reasonable explanation of his having told the police that he did not know where he was when in fact he was on a main artery a few miles out of London, is too absurd to need further comment.

The court can only express its gravest disapprobation of the conduct of the chairman. He is a man to whom the lay members of the court have a right to look for guidance, and on whom they are entitled to rely for the proper conduct of cases which are brought to be tried on indictment before them. The explanation which he has offered is that from his experience gained at the Bar and as chairman of various quarter sessions he was quite certain that no jury would have convicted. It was not for the chairman to try the case himself. The prosecution had a right to present their case. It is not his duty to take sides or to do all he can to secure the acquittal of a prisoner. It is his duty to hold the scales evenly and to sum up the case if there is evidence fit to be left to the jury, as on the depositions there unquestionably was, and to place before them fairly and impartially the evidence given by the prosecution and the matters submitted by the defendant.

That a judge may express his own opinion on matters arising out of the evidence there is no doubt, and no one would wish to prevent him doing so provided that he does it temperately and fairly. He has said in his affidavit that he did not intend to withdraw the case from the jury nor did he intend to direct them what to do. He says that he intended that the jury should there and then consider whether they wanted to hear evidence to support the facts opened by counsel for the prosecution when such facts disclosed what he thought was a weak case. We find it difficult to accept that explanation, for what he did could only have indicated that he desired the jury to stop the case, and, indeed, that he was determined they should do so. From first to last the conduct of the chairman in this case can only be described as both unjudicial and injudicious. This was a serious case preferred by the direction of the commissioner of metropolitan police. It was in fact never tried because the chairman prevented its being tried, and to pretend that there has been here the free exercise by the jury of their right to acquit on the merits need only be stated to be rejected. The answer of the foreman of the jury clearly shows that they understood that he was directing them to acquit, and that seems also to have been the opinion of the clerk of the peace, for he indorsed the indictment with regard to count (1) "Verdict not guilty by direction."

The Attorney-General contends that in this case there has been no trial at all, and therefore he submits that the order of discharge should be quashed and that this court should order that the case should be heard according to law. That it was not heard according to law in one sense is perfectly true, for the proceedings of the chairman were irregular from beginning to end, and his action prevented any evidence from being given. Again, in one sense it is true to say that there has been no trial, but this court has no power to order a retrial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity. Moreover, though there have been cases in which the court has ordered a venire de novo because of a mistrial, we have not been referred to a single case, nor can one be found, where this has been done after a verdict of not guilty has been recorded.

The Attorney-General relied particularly on *Rex* v. *Wandsworth Justices; Ex parte Read.*[26] The headnote, which conveniently summarizes the decision, is: "Where there has been "a denial of natural justice before a court of summary juris-"diction, resulting in the conviction of a defendant, his remedy "is not by case stated or appeal to quarter sessions, but by "application to the High Court for an order of certiorari to "remove and quash the conviction." But that, it will be observed, was not only a case concerning a court of summary jurisdiction, but one in which there had been a conviction, and the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural justice. There is in fact no case to be found in which the court has ever ordered a retrial after a verdict of not guilty.

One case to which our attention was called was *Rex* v. *Marsham; Ex parte Pethick Lawrence*,[27] which was followed in *Bannister* v. *Clarke.*[28] In the first case a person was convicted of assaulting a police constable and by inadvertence the constable gave his evidence unsworn. On discovering this fact the magistrate reheard the case, had the witness sworn and came to the same conclusion and convicted. It was held that as the first proceedings were a mere nullity no plea in the nature of autrefois convict could be set up because the applicant had never been in peril on the first hearing owing to the irregularity. But here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that had the record been drawn up the error would have been apparent: *Rex* v. *Neal.*[29] The fact that the jury have acquitted without evidence would not appear on the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of not guilty, no evidence having been offered. The verdict is received and recorded and the prisoner discharged. Suppose counsel in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for retrial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of not guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. In *Rex* v. *Simpson,*[30] Scrutton J. said[31]: "There never "has been a case in which an acquittal by a court of summary "jurisdiction has been quashed by certiorari, and, although in "some cases judges have acted proprio vigore in making prece- "dents, I do not myself feel disposed to do so in this case." Nor do we; an acquittal by a jury seems to be a fortiori.

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[26] [1942] 1 K.B. 281.

[27] [1912] 2 K.B. 362.

[28] [1920] 3 K.B. 598.

I do not think it necessary to go in detail through the large number of cases which were cited to us. None of them in my opinion supports the proposition that we could order a retrial in this case. The trial was deplorably irregular, but it was not a mistrial in the legal sense. This was obviously a proper case to bring before this court, but for the reason which I have given it is impossible for us to interfere, and the application must therefore be refused.

Application refused.

Solicitors: *Director of Public Prosecutions; C. W. Radcliffe; Clifford-Turner & Co.*

S. C.

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[29] [1949] 2 K.B. 590.

[30] [1914] 1 K.B. 66.

[31] Ibid. 75.

C. A.

1952
May 27, 28.

Singleton, Denning and Hodson L.JJ.

BIBERFELD *v.* BERENS.

[1951 B. 1905.]

Husband and Wife—Principal and agent—Necessaries—Separation due to husband's cruelty—Maintenance—Money paid to wife by third party for necessaries—Whether husband liable to third party —Wife's financial resources.

A wife, who had left her husband in March, 1949, on account of his cruelty to her, accepted a weekly payment of £5 from her brother to pay for her board and lodging and to buy necessaries until a decree was granted in December, 1949. Subsequently, she applied for and obtained an order for maintenance for a greater sum but the order operated only from the date of the decree absolute. At the time the payments were made by the brother, the wife had £1,125 in saving certificates, a bank balance of £37, a dividend of £7 5s. 9d., and jewellery of a value of not less than £250. Her brother sued the husband for repayment of the money paid to her on the credit of the husband because he had failed to provide her with any maintenance:—

Held, that regard should be had to the wife's financial means in considering whether, when she was turned away from the matrimonial home, she could pledge her husband's credit for necessaries. At common law, a wife had authority in such circumstances to pledge her husband's credit for actual necessaries suitable to his standard of living, if she was in need, but the right to borrow money on the credit of the husband was an equitable right and equity only intervened where no other remedy was available. The wife could have applied for maintenance to the court and, in assessing the amount due to her, account would then have been taken of her means. The test was similar if she borrowed money before an order was made, or in lieu of applying for an order. The wife could not pledge her husband's credit as an agent of necessity unless there was an emergency which a court order for maintenance could not meet, or could not meet sufficiently quickly, so that she was in immediate need. On the facts as found this wife was not in need, and she had therefore, no authority to pledge her husband's credit. Consequently, the plaintiff's claim failed.

Direction of Lord Ellenborough C.J. in *Liddlow* v. *Wilmot* (1817) 2 Stark. 86, applied. *Litson* v. *Brown* (1866) 26 Harrison Indiana Rep. 489, approved.

Per Denning L.J. Whilst a husband and wife are cohabiting, it is doubtful whether, if the wife is wealthy, she can pledge her husband's credit for her own private necessaries as distinct from the household necessaries. Dicta of McCardie J. in *Callot* v. *Nash* (1923) 39 T.L.R. 291, 293, disapproved.

Decision of Lynskey J. affirmed.

APPEAL from Lynskey J.

A husband and wife were married on September 25, 1939. On March 28, 1949, the wife, Ena Berens, left her husband, the defendant, and went to live with her sister, on account of his cruelty, and began proceedings for divorce. On June 1, her solicitors served the petition on the husband and, in a covering letter, told him that they had not included in the petition any claim for maintenance because it was desirable to avoid unnecessary proceedings, but that they would be glad to have his proposals. No proposals were in fact made and no application for alimony was made, under section 190 of the Judicature (Consolidation) Act, 1925 (now replaced by section 19 of the Matrimonial Causes Act, 1950),[1] before the hearing of the petition on October 5, 1949, when the wife was granted a decree nisi. On December 29, 1949, the decree was made absolute.

On October 10, 1950, an order by consent was made on the wife's summons for maintenance by which she was to have £286 per annum (i.e., £5 10s. per week). The order operated from December 29, 1949. No order was made for maintenance before that date.

The plaintiff, who was the wife's brother, took proceedings against the husband claiming that he had lent to his sister £5 per week from the date when she left her husband until the date of the decree absolute, making a total of £195, for the purchase of necessaries, he having omitted and refused to provide her with any maintenance. It was not disputed that the money was used to pay the sister for board and lodging and to purchase clothing and other necessaries.

The evidence as to the wife's financial position when she left her husband was that she had £1,125 in saving certificates, a bank balance in her favour of £37, a dividend of £7 5s. 9d. and jewellery of a value of not less than £250. After discussion with her brother he offered to lend her money until such time as she should be receiving maintenance.

Lynskey J. gave judgment for the husband. He found that the wife was possessed of means sufficient to enable her to support herself in a manner suitable to her husband's station in life, and that, accordingly, she had no authority to pledge his credit with her brother. The plaintiff appealed.

[1] Matrimonial Causes Act, 1950, s. 19 (1): "On any petition for "divorce . . . the court may make "such interim orders for the payment "of alimony to the wife as the court "thinks just."

Burton Q.C. and *G. Heilpern* for the plaintiff brother. The money advanced by the wife's brother on the husband's credit was for the purchase of necessaries and it is recoverable from the husband. The wife could pledge her husband's credit because he had driven her away. In *Liddlow* v. *Wilmot* [2] Lord Ellenborough said that a husband was only liable to maintain his wife if her own means were insufficient, but in *Davidson* v. *Wood*,[3] which was not cited to Lynskey J., a wife was able to pledge her husband's credit although at the time she had means of her own.

[SINGLETON L.J. In *Davidson* v. *Wood* [3] Knight-Bruce L.J. said that borrowing was necessary over and above the wife's separate means.]

It is submitted that Wood V.C. went beyond that when he said that the wife need not spend her own means before she could call on her husband to support her, and a wife cannot be required to do so when, as in this case, her husband has driven her away.

It is immaterial that the wife did not exercise her right to apply for alimony pendente lite before pledging the husband's credit, for a wife is entitled to pledge her husband's credit for necessaries even though she may not choose to bring proceedings for divorce and without waiting to issue her petition; nor is it relevant to consider how much she may get, or might have got, by way of alimony, for that would make it incumbent on a person advancing money to consider the wife's chances of success in litigation before he could safely lend a destitute wife anything on her husband's credit. [He referred to *Reed* v. *Moore*.[4]] The amount which she could get by way of alimony is not the measure of the credit. It may be that she can get more by pledging her husband's credit with a third party than a court would award to her as alimony but, since the husband turned her away, there seems to be no reason why she should not choose her remedy, and she may borrow if it is easier for her to do so rather than to bring proceedings. The material question is whether the wife had, or had not, authority to pledge her husband's credit. She had an agency for necessaries or essentials, but the standard for deciding what were "necessaries" is her husband's standard of living. It is not relevant to consider whether the wife was necessitous for she was not an agent of necessity.

A wife who is driven away from the matrimonial home by the cruelty or misconduct of her husband has, by an irrebuttable presumption of law, authority to pledge her husband's credit for necessaries according to his standard of life, but, if the separation was by mutual consent, the scope of the wife's authority may be modified by the terms of the separation agreement. The cause of the separation in *Liddlow* v. *Wilmot*[5] was not clear, but it does not appear from the report that the wife was originally driven away by the husband's conduct, although he subsequently lived with another woman. That is supported by the way the editors of the English and Empire Digest classified the case. If this husband disputed the wife's authority to pledge his credit, he should have proffered maintenance when asked to do so by her solicitors.

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[2] (1817) 2 Stark. 86.

[3] (1863) 32 L.J.Ch. 400.

[4] (1832) 5 Car. & P. 200.

The husband's duty to maintain his wife according to his standard of living is absolute, and is not taken away if by his cruelty he drives her from the matrimonial home, nor is it qualified by the extent of the wife's means. In *Thompson* v. *Hervey*[6] the wife was entitled to a pension and it was not argued that she had to spend that first. Even if a wife can be required to use any income she may have before she can call on her husband to maintain her, which is not accepted, she cannot be expected to realize her capital assets. In this case the wife had no income and, except for the fact that she had certain capital assets, it is on all fours with *Weingarten* v. *Engel.*[7] The wife was not driven away in *Montague* v. *Benedict.*[8] In *Johnston* v. *Sumner*[9] Pollock C.B. referred to the rights of a wife who was turned away, but it is submitted that he may in that context have been using the expression "turned away" loosely as meaning that the parties were not living together. But if he meant to include the case where the wife has been driven away by the husband, then his remarks were obiter for there the parties had separated by mutual consent. His remarks were not followed in *Davidson* v. *Wood.*[10] [Counsel referred also to *Seymour* v. *Kingscote*[11] and *Sandilands* v. *Carus.*[12]]

D. P. Bailey and *Greenburgh* for the husband. The wife could not pledge her husband's credit unless she was in want. She must be necessitous at each time a payment is made to her by the third party on the credit of the husband. But the evidence here is that the brother's donation was spontaneous and was not made in response to a request from her because she was in need.

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[5] 2 Stark. 86.
[6] (1768) 4 Burr. 2178.
[7] [1947] 1 All E.R. 425.
[8] (1825) 3 B. & C. 631, 635.
[9] (1858) 3 H. & N. 261.
[10] 32 L.J.Ch. 400.
[11] (1922) 38 T.L.R. 586.
[12] [1945] K.B. 270.

There is nothing to show that she was at any material time in want, and, consequently, she never became the agent of necessity of her husband. In *War* v. *Huntly*[13] it was held that the earnings of a deserted wife had to be used for her maintenance, and in *Tempany* v. *Hakewill*[14] the chancellor must have been satisfied that she had adequate means for he refused to make an order, and treated her as though she had obtained an order of judicial separation. The equitable doctrine, which is relied on here, began with *Deare* v. *Soutten*,[15] which is referred to in *Weingarten* v. *Engel*.[16] If since *Deare* v. *Soutten*,[17] the extent of the wife's means is irrelevant, Humphreys J. would not have been at pains to point out, as he did, that the wife was without support in that case, but he would rather have said that that was irrelevant. In *Bazeley* v. *Forder*[18] Blackburn J. said that a wife was entitled to pledge her husband's credit, unless in some other way she was provided with means for supplying her wants. His remark was obiter but it indicates what he would have held to be the law in a case where a wife had been separated from her husband owing to his misconduct. *Liddlow* v. *Wilmot*[19] which was the basis of the judgment of Lynskey J., has never been expressly questioned or even doubted by implication. It was cited in *Davidson* v. *Wood*,[20] and although on the special facts of that case it was found that the wife could pledge her husband's credit, that was because her independent means were insufficient to support her and she was still in need. *Davidson* v. *Wood*[20] does not overrule *Liddlow* v. *Wilmot*.[21] In *Reed* v. *Moore*[22] the facts are not stated sufficiently to show whether there was sufficient left to the wife for her maintenance. *Seymour* v. *Kingscote*[23] and *Callot* v. *Nash*[24] are not in point, for the advances were made to the wife while she was cohabiting with her husband. *Clifford* v. *Laton*[25] shows that if the wife and husband are living apart the wife has authority to pledge her husband's credit only if she is his agent of necessity. In *Sandilands* v. *Carus*[26] a maintenance order in favour of the wife did not destroy her authority, for the whole question is one of amount, and the court must, it is submitted, look to see whether the wife has enough to provide the ordinary requirements of life, and may say that if she has some means, but not enough, she may pledge her husband's credit for the balance. During cohabitation her rights arise from her status as manageress of the household. Those cease when she leaves the matrimonial home, but if she leaves because she is driven away by her husband's conduct, other rights arise and she may become an agent of necessity. The American courts have followed *Liddlow* v. *Wilmot*.[27] [Counsel referred to *Litson* v. *Brown*,[28] *Hunt* v. *Hayes*[29] and *Prescott* v. *Webster*.[30]] *Liddlow* v. *Wilmot*[31] was decided at a time when the rights of women were more limited than they are at present, and it seems unlikely that at the present time the doctrine there established would be challenged.

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[13] (1704) 1 Salk. 118.
[14] (1858) 1 Fost. & Fin. 438.
[15] (1869) L.R. 9 Eq. 151.
[16] [1947] 1 All E.R. 425.
[17] L.R. 9 Eq. 151.
[18] (1868) L.R. 3 Q.B. 559.
[19] 2 Stark. 86.
[20] 32 L.J.Ch. 400.
[21] 2 Stark. 86.
[22] 5 Car. & P. 200.
[23] 38 T.L.R. 586.
[24] (1923) 39 T.L.R. 291, 293.
[25] (1827) 3 Car. & P. 15.
[26] [1945] K.B. 270.

Burton Q.C. in reply. No case has been cited which, in relation to its own facts, lays down that if a wife is turned out by her husband, her means have to be taken into account in deciding whether she has authority to pledge her husband's credit for necessaries. The American case of *Litson* v. *Brown*[32] is persuasive authority only and it is founded on *Liddlow* v. *Wilmot*,[33] which initially was a case of consensual separation between the parties. For some 30 years, apparently, the wife accepted the separation in that case, and it was not arguable there that she had authority to pledge his credit. Similarly, *Johnston* v. *Sumner*[34] was clearly a case where the parties had separated by mutual consent. It is submitted that the husband's liabilities do not change when the wife leaves the matrimonial home, for otherwise he could get rid of a liability by his own wrong in turning out his wife. The agency of the wife for necessaries, but not of necessity, springs from the marriage obligation. The common law rights, and since 1873 her equitable rights, to pledge his credit have not been cut down in the Divorce Courts. But even if the Divorce practice were followed here and her capital were notionally capitalized, she would not have had sufficient means to maintain herself.

SINGLETON L.J. This is an appeal from a considered judgment of Lynskey J. which was given at Manchester Assizes on December 20, 1951, in favour of the defendant.

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[27] 2 Stark. 86.

[28] (1866) 26 Harrison Indiana Rep. 489.

[29] (1892) Vermont. 23 Atlantic Rep. 920.

[30] (1900) Massachusetts. 56 N.E. Rep. 577.

[31] 2 Stark. 86.

[32] 26 Harrison Indiana Rep. 489.

[33] 2 Stark. 86.

[34] 3 H. & N. 261.

C. A.
1952

Biberfeld
v.
Berens.

Singleton L.J.

It is an interesting case, and has been very fully argued before us. I do not propose to refer to all the authorities cited to the court, for I think the principle can be stated fairly shortly when the authorities are examined and, furthermore, I think this case depends wholly on the facts.

[His Lordship then stated the facts and continued:] At the hearing before Lynskey J. evidence was given by the plaintiff, by his sister the wife of the defendant, and by the defendant. It was submitted to Lynskey J., and to this court, that if a wife is turned out of the matrimonial home, her husband is liable to provide her with necessaries even though she has adequate means herself, and that if someone else provides her with necessaries, or with money to obtain necessaries, that person has a right against the husband irrespective of whether the wife has means of her own or not. The submission of Mr. Burton in this court was that, however much money the wife has, the husband is bound to keep her if she is turned out of doors, or if there is impropriety on the part of the husband which causes her to leave the house; and that the wife's income does not enter into the matter. Further, Mr. Burton submitted that the wife was virtually without means in this case, that she had no income, or nothing which could be taken as income, to provide her with necessaries.

[His Lordship then stated the wife's financial assets and said:] Lynskey J. said: "Following the decision of Lord Ellen-"borough in this case I am satisfied that although the defendant "was bound by law to afford his wife means of support adequate "to their station in life, she was possessed of means from other "sources and, as a result, was prevented from pledging her "husband's credit either in law or in equity. The plaintiff has "not established that there was an insufficiency in Mrs. Berens' "funds to enable her to support herself in a manner suitable to "her husband's situation. In the result there must be judgment "for the defendant." Lynskey J. came to the conclusion that, before the plaintiff could succeed it must be shown that there was insufficiency of funds, and he did not consider that that had been shown, and therefore he gave judgment for the defendant.

The authorities which have been cited to the court go back many years. The first to which I propose to refer is *Liddlow* v. *Wilmot*.[35] The report gives the direction of Lord Ellenborough to a jury: "In an action against the husband for lodging and

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[35] 2 Stark. 86.

" necessaries supplied to his wife, who lives separately from him " without any fault of her own, and who is possessed of funds of " her own, the question is, whether she has such means as are " adequate to her support, according to her husband's situation " in life."

" This was an action against the defendant for lodging and " for necessaries supplied to his late wife. It appeared that the " defendant and his wife had separated 30 years before the time " of bringing the action, that she had separate funds of her own, " of which she had all along been in the receipt, amounting, after " all deductions, to about £110 per annum. The defendant had " been for 11 years a prisoner in France, and was afterwards a " captain on half pay. At the time the lodgings were occupied " by his wife, he lived in lodgings with another woman, with " whom he had long cohabited, and by whom he had a daughter " who was then of the age of 25; who lived with him, and he " paid £20 per annum for his lodgings, and had been heard to " say that he had an estate in Worcestershire. It appeared that " his wife at her death was in possession of two boxes of plate, " which she desired might upon her death be delivered to a " gentleman whom she had appointed to be her executor. These " boxes had been so delivered, but upon a demand made by her " husband, they had been delivered up to him. The question " was, whether under these circumstances the defendant was " liable. Lord Ellenborough, in summing up to the jury, " observed: This case presents circumstances of an unusual " nature. A separation between the defendant and his wife had " taken place 30 years before. It does not appear what the " original cause of separation was, but a reason for the continuance of the separation does appear, since the defendant formed " another connexion, and had a daughter who was living with " him of the age of 25. During the whole period of separation, " it does not appear that any application was made to him for " any funds subsidiary to the support of his wife; she had all " along resources of her own, which the plaintiff was acquainted " with, and no resort was had to the husband. The first question " for consideration is, whether the defendant turned his wife out " of doors, or by the indecency of his conduct precluded her from " living with him, for then he was bound by law to afford her " means of support adequate to her situation, but if either from " her husband, or from other sources, she was possessed of such " means, the law gives no remedy against the husband. He is " liable only in case of the insufficiency of her funds." Later in his direction Lord Ellenborough said: "The only credit given to "her husband is an implied one, which arises from his situation, "and the inadequacy of the funds of the wife."

That direction seems to me to state the law accurately, if I may say so with respect. It is said that there is no certainty as to how husband and wife had come to part in that case, but in *Johnston* v. *Sumner*[36] Pollock C.B. said[37]: "In *Liddlow* v. "*Wilmot*[38] the husband was living with another woman; con- "sequently the wife was necessarily away." In *Johnston* v. *Sumner*[39] the sidenote reads: "During cohabitation, a wife has "an implied authority as agent of her husband to pledge his "credit for necessaries suitable to her station, notwithstanding "any private agreement between them. If a husband turns his "wife away and she is unable to maintain herself, she has an "authority of necessity to pledge his credit for necessaries "supplied to her. Sed quaere, whether, if a labouring man turns "his wife away, she being capable of earning, and earning as "much as he did; or if a man turned his wife away she having "a settlement double his income in amount, the wife in such "cases could bind the husband. If a wife leaves her husband "without his consent, she has no authority whatever to bind "him"; and it was held in that case that the husband was not liable for necessaries supplied to his wife, the plaintiff having failed to show that her allowance was insufficient, or that she had any authority to pledge her husband's credit. At the end of his judgment Pollock C.B. said[40]: "Upon the ground then that the "question is one of the wife's authority; that the creditor had "to make that out; that to make it out he must show that the "wife, living separate, did so under circumstances from which "an authority might be implied; and, assuming that a separation "by consent and no allowance, or an insufficient allowance, "would give rise to such implication (which we doubt), we are "of opinion that it was for the plaintiff in this case to show the "allowance was insufficient; and, that not being done, the non- "suit was right, there being no evidence that the plaintiff was "authorized to charge the husband."

It was submitted to this court that the effect of those two cases was reduced, or weakened, by the judgments in the case of *Davidson* v. *Wood*.[41] I have looked with care at the facts of that case, and at the judgment, and though there may be a line or two in the judgment of Wood V.-C. which gives some support for the plaintiff's contention, I am satisfied, on examination of the judgment of Knight Bruce L.J., Turner L.J. agreeing, that no support can be found for the submission which is made on behalf of the plaintiff that that decision is a departure from the law as stated by Lord Ellenborough in his direction to the jury in *Liddlow* v. *Wilmot*.[42]

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[36] 3 H. & N. 261.
[37] Ibid. 270.
[38] 2 Stark. 86.
[39] 3 H. & N. 261.
[40] 3 H. & N. 261, 270.
[41] 32 L.J.Ch. 400.

In 1868 there was before the court *Bazeley* v. *Forder*.[43] The headnote in the Law Reports reads: "The plaintiff, on the order "of the defendant's wife, supplied clothes for the defendant's "child; the wife was living separate from him for reasons which "justified her doing so, and the child, which was under seven "years of age, was living with her, against the defendant's will, "an order of the Master of the Rolls having been made, under "2 and 3 Victoria, c. 54, giving the wife the custody. The wife "had no means adequate to support her according to her "husband's degree:—*Held*, by Blackburn, Mellor and Lush JJ. "(Cockburn C.J. dissenting), that as the child was by law "properly in the care of the wife, the reasonable expenses of "providing for it were part of the reasonable expenses of the "wife, for which she had authority to pledge her husband's "credit." The judgment of the majority of the court was given by Blackburn J. The lines which I read from that judgment are in a sense obiter, but, none the less, it is interesting and, I think, useful to see how Blackburn J. expressed himself on the problem which is before this court. He said[44]: "There was some "evidence that the wife had some separate property, but the "jury found (and on the evidence were justified in finding) that "it was inadequate to support the wife according to her husband's "degree. A wife, when separated from her husband in conse-"quence of misconduct on his part rendering it improper for her "to remain with him, is in the same position as if he turned her "out of doors, and is by law clothed with power to pledge his "credit for her reasonable expenses, according to her husband's "degree, unless she is in some other way supplied with the "means of providing them."

Evidence as to the wife's separate property had been given before the court of first instance in *Bazeley* v. *Forder*,[43] and it does not appear that any question was raised as to its relevance or admissibility. The important part of the citation is in the last few words: " . . . unless she is in some other way supplied with "the means of providing them."

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[42] 2 Stark. 86.
[43] L.R. 3 Q.B. 559.
[44] Ibid. 562.

Lynskey J. adopted the view expressed by Lord Ellenborough, and he was not satisfied that there was any insufficiency of funds. That was a question of fact for him. I do not think it can be said that the fact that a wife has not a very large income means she has insufficiency of funds at a time when she is waiting for a decree of divorce, particularly as she knows, or must be advised, of her right to apply for alimony.

It seems to me that this appeal fails on the grounds I have stated. Mr. Desmond Bailey referred to decisions of courts in the United States of America which are not binding on this court; one of them states the position perhaps more clearly than the English authorities do. That is *Litson* v. *Brown*[45]: "Husband and wife—Separation.—If a wife, while "separated from her husband, has the means of support, whether "furnished by the husband or arising from her separate estate, "the husband, though the separation may have taken place on "account of his misconduct, can only be held liable, while she "has such means, for necessaries furnished to her, upon his "express promise to pay. But if the separation was produced "by his misconduct, and she had no means of support till some "time after the separation, he would be liable for necessaries "furnished to her in the interim."

That was an appeal from the (Jefferson) Common Pleas, and the judgment was given by Elliott J. about a year after the end of the Civil War[46]: "The husband is bound to support and maintain the wife, and to furnish her with necessaries, and during "cohabitation there is a presumption of law, arising from that "fact, that the husband assents to contracts made by the wife "for the supply of articles suitable to their means and station "in life. It is an implied agency, arising from the marriage "relation, during cohabitation. But when the parties cease to "live together, then a new state of things arises, and with it "new rules of law. The implied agency of the wife to contract "for necessaries, arising from cohabitation, no longer exists. If "the wife, of her own will, elopes or leaves the husband, without "his fault, he is not responsible even for necessaries furnished "her by one having a knowledge of the separation. But if the "husband expels the wife from his house without her fault, or "compels her to leave his house by cruelty to her, and without

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[45] 26 Harrison Indiana Rep. 489.

[46] Ibid. 491.

"the means of support, he sends with her credit for her reasonable expenses. This liability does not, in such case, rest upon an implied agency, but is an obligation imposed by the law from necessity, and is founded on the marital relation, and the duty of the husband to maintain the wife."

Two different positions are dealt with in the judgment, and I emphasize that because it was said that a wife should not be worse off after she is turned out of the matrimonial home than she was before. So long as husband and wife are living together in the family home the wife is the husband's agent to order things for the home; if the wife is turned out without means there arises an obligation imposed by the law of necessity, an agency of necessity, and then it is important, as I think, to consider what means the wife has.

The judgment continues: "If the husband who, in violation of his marital obligations, drives his wife from his house without the means to procure the necessaries of life, could also deny the credit to supply them, she would be liable to suffer or perish from want. The law, therefore, from necessity, authorizes any one to supply her necessary wants, under such circumstances, and to look to the husband for compensation. But if she has the means of support, while so separated from her husband, come from what source they may, whether furnished by the husband, or arising from her separate estate, no necessity exists that they should be furnished by others, and in such cases the husband could only be held liable upon an express promise to pay." Elliott J. cited a passage from an early edition of Chitty on Contract, and he also cited from *Liddlow* v. *Wilmot*[47] the direction to the jury given by Lord Ellenborough.

I think it right to refer to *Litson* v. *Brown*[48] as it puts the matter so clearly; and though, as Mr. Heilpern reminded us, it is not binding on this court, it is in accord with the judgments to which I have referred, and which I think correctly state the law, and it is complete support for the proposition which Mr. Desmond Bailey, on behalf of the defendant, put forward.

Mr. Desmond Bailey also cited to the court two other cases arising in the United States of America, one from the State of Vermont[49] and the other from the State of Massachusetts.[50] I do not think it necessary to consider them further; we are indebted to him for the research he has made as to the state of the law beyond the seas.

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[47] 2 Stark. 86.

[48] 26 Harrison Indiana Rep. 489.

[49] Vermt. 23 Atlantic Rep. 920.

[50] Massachusetts. 56 N.E.Rep. 577.

The other matter which I ought to mention is that, on the facts, I do not think that either agency or necessity arises.

[His Lordship then examined the evidence of the wife and her brother as to the loan made to her, and continued:] When the separation took place the plaintiff in the action, being head of the family, thought it right to support his sister, and he paid £20 a month, or £5 a week, to her. His sister went to live with another sister at Queens Road, Southport, and used the money which she obtained from her brother to pay to the sister, or to the sister's husband, for keeping her. That was a very proper arrangement, but it cannot be said, in those circumstances, that the wife, who had not asked for the money, was the agent of necessity of her husband to borrow the money from her brother. I do not think that there was any agency of necessity here at all.

The appeal should be dismissed.

DENNING L.J. I agree.

Mr. Burton's argument was that where husband and wife are living together, the husband is bound to provide necessaries for his wife even though she has much more money than he has. Mr. Burton said that she can spend her own money in the most extravagant way on articles of luxury, and, nevertheless, at the same time pledge her husband's credit for necessaries. He said that a wife's means are not relevant to the husband's obligation to maintain her when they are living together. Starting from that position, Mr. Burton argued that if the husband afterwards turns his wife out, or by his cruelty forces her to leave him, her means are still irrelevant, for the husband ought not to be better off by turning her out than by living with her; he ought still to keep her, even though she has ample means to keep herself.

I do not accept the proposition that when husband and wife are living together the means of the wife are irrelevant. I know that in *Callot* v. *Nash*[51] McCardie J. said: "The law "draws no distinction between a wife with a large income and "a wife with no income at all. . . . The wife may accumulate "all her income and throw the whole burden of her keep upon "her husband." I do not think that is right. At the present day, when a wife is in nearly all respects equal to her husband, she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do. When they are living together she can, of course, pledge his credit for the household necessaries, but I doubt whether she can pledge his credit for her own private necessaries, like dresses and hats, when she has ample means with which to buy them.

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[51] 39 T.L.R. 291, 293.

Whatever may be the true position when they are living together, the law when they are separate is quite clear. If a wife is deserted by her husband, or if he treats her with such cruelty that she is forced to leave him, she is entitled at common law to pledge his credit for necessaries, subject, however, to this qualification, that if she has earning power of her own, or money of her own, which she could reasonably be expected to use to pay for the necessaries, she has no authority to pledge his credit for them. In addition to the authorities which my Lord has cited, I refer to the notes to *Manby* v. *Scott*,[52] where the same proposition is stated.

There is, however, a distinction between necessaries and money. At common law a wife only had authority to pledge her husband's credit for actual necessaries such as food, clothing, board and lodging. She had no authority to borrow money on his credit. That authority was only introduced in equity: see *Deare* v. *Soutten*.[53] It is to be remembered, however, that equity only intervenes where there is no other adequate remedy. Nowadays there are remedies in the magistrates' courts and in the High Court by which the husband can be made to pay maintenance to his wife. In all these courts, in assessing maintenance, regard is had to the earning power of the wife and to her means. It would be a remarkable thing if equity should disregard her means when all other courts take it into account. It cannot be supposed that a wife can get more out of her husband by borrowing from her relatives than by going to the courts. In my opinion, a loan to a wife will only be enforced in equity against the husband if it is needed to meet a present emergency, and a court order for maintenance is inadequate, or not available in time, to meet the difficulty; and, in every case, the means of the wife must be taken into account.

Applying this principle, I am prepared to assume that it would take a few weeks before the wife could get an order from the courts for maintenance. The question is whether, during that time, there was such an emergency as to entitle her to borrow money on her husband's credit. I confess that I have been a good deal troubled about this because all she had was about £1,000 savings certificates and a small sum of cash at the bank. I can see that in many cases a wife could not reasonably be expected to realize her capital assets. For instance, if she had only the house in which she lived with her children, she could not be expected to sell it; or if all she had was an insurance policy, she could not be expected to surrender it. It all depends on what could reasonably be expected of her. In the present case the wife had only to support herself for a few months until she got a divorce and an order for maintenance. Lynskey J. must have thought that she could reasonably be expected to get the necessary money for that period from her cash at bank or by realizing some of her savings certificates. There is no such emergency as to entitle her to borrow money on her husband's credit. On this reading of the judgment, I agree that the appeal should be dismissed.

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[52] 2 Sm.L.C., 13th ed., 456, 470.

[53] L.R. 9 Eq. 151.

HODSON L.J. I agree.

The plaintiff is the brother of a Mrs. Berens; he claims £195 as money lent to her, the wife of the defendant, in sums of £5 a week, making a total of £195, in order that she might buy the necessaries of life, in particular food and clothing.

Lynskey J. found that Mrs. Berens had to leave her husband, the defendant, because of his cruelty; that during the material time the defendant had made no provision for her maintenance; and that during this time the plaintiff lent to Mrs. Berens £195, not giving credit to her, but hoping to recover the money from the defendant. Lynskey J. also found that the money was spent by her on necessaries, and finally that she had certain assets of a value of about £1,450 which she did not realize.

I proceed on the basis that those findings of fact were justified by the evidence. Those findings were substantially those which the plaintiff sought to obtain, and the question to be determined was whether the plaintiff was entitled to recover on the footing that his sister was an agent of necessity. Lynskey J. said: "Without reference to authority I should have thought that a "wife could only be an agent of necessity if the necessity for "that agency in fact existed. The doctrine was evolved in the "days when a wife had no property. All her property on "marriage became the property of the husband. She could not "even make a contract and could not even sue except through "a next friend. Unless she could pledge her husband's credit "when deprived of her home and her husband's support, she "would starve. If, however, by way of settlement of property "to her separate use, or if she could earn her livelihood, or was "being maintained by some third person, such as her father or "widowed mother, the necessity no longer existed." That has been the contention put forward on behalf of the defendant in the court below and here. Mr. Burton, on the other hand, has argued that that is not the true test; that the word "necessaries" does not involve that the wife is, herself, in necessity, but only refers to the character of the goods which are provided, particularly food, board and lodgings, and clothes.

I think that Lynskey J., having stated the law in that way, and having considered the authorities, was right. He relied on *Liddlow* v. *Wilmot*,[54] in which Lord Ellenborough, in charging the jury, directed them: "The first question for consideration is, "whether the defendant turned his wife out of doors, or by the "indecency of his conduct precluded her from living with him, "for then he was bound by law to afford her means of support "adequate to her situation, but if either from her husband, or "from other sources, she was possessed of such means, the law "gives no remedy against the husband. He is liable only in case "of the insufficiency of her funds."

Lynskey J. considered also the case of *Johnston* v. *Sumner*,[55] to which reference has already been made, in which the law, as indicated by Lord Ellenborough, was restated; but Mr. Burton has said, first, that this authority is not binding on this court; and, secondly, that it is inconsistent with *Davidson* v. *Wood*.[56] That case was not actually cited to Lynskey J., but, in my view, it does not detract from the view of the law which had previously been stated. In *Davidson* v. *Wood*[56] a solicitor advanced money to a wife who had been put to the expense of moving herself and her lunatic husband to London. She had some means. It does not seem to me that the previous cases, particularly *Liddlow* v. *Wilmot*[57] were doubted; indeed, there is no indication in the judgments to that effect. On the facts of that case, the means of the wife being small, it was held that the liability of the husband to provide necessaries for his wife was sufficient to found the action by the solicitor.

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[54] 2 Stark. 86.

[55] 3 H. & N. 261.

[56] 32 L.J.Ch. 400.

[57] 2 Stark. 86.

A much older case was cited to the court. *War* v. *Huntly* was tried at Nisi Prius before Holt C.J. and shortly reported [58]: "The case was: An ordinary working man married a woman of "the like condition; and after cohabitation for some time the "husband left her, and during his absence the wife worked; and "this action being brought for her diet, it was held that the "money she earned should go to keep her." That statement of the law has, I think, never been doubted in any subsequent authorities, but Mr. Burton has argued that it is inconsistent with a rule of law that a husband's liability to maintain his wife is absolute and does not depend on her means. He argued that, so long as she does not forfeit her right by her misconduct, or, at least, separate from the husband by mutual consent, he is bound to provide her with necessaries in accordance with his own means. There are undoubtedly dicta in the cases which support Mr. Burton's argument. I have in mind, particularly, the dicta of McCardie J. in the case of *Callot* v. *Nash*.[59] I think, in so far as those dicta are of general application, they go too far, but it must be remembered that that was a case in which the parties were living together, and it was merely an illustration of the principle that, where husband and wife are living together, prima facie if she orders goods for the household, those goods are ordered with the husband's authority. I think the true position in law is that the absolute liability of the husband to maintain his wife remains alive while they are living apart through his fault. The husband may, therefore, be called on at any time to fulfil his obligation, should circumstances render it necessary, such as the insufficiency of the fortune of the wife, or even circumstances of a temporary nature, such as her inability to obtain possession of her fortune. This does not, in my judgment, involve the proposition contended for, that a wife may, if she chooses, deliberately abstain from using her own means and rely on the husband's duty to maintain her. It is not, however, necessary to decide what is the position if the husband and wife are living under the same roof, but if they are apart, through the husband's fault, the position is, I think, quite clear from the authorities. It is, to some extent, supported by the practice in the Divorce Court, which inherits the ancient practice of the ecclesiastical courts that where a wife has means approximately equal to, or greater than, those of her husband, where there are no children or special circumstances, such as ill-health, involving heavy expenditure, she cannot expect to obtain an order for alimony or maintenance. In my judgment, a person who advances money to a wife who has been turned away by her husband cannot maintain that her means are irrelevant when he seeks to maintain an action against the husband for the price of necessaries supplied to her. I think the sufficiency of the means of the wife in each case is a matter of fact and degree. An action can be maintained though the wife is not in a state of complete destitution. That is shown by *Davidson* v. *Wood*,[60] but that case does not dispose of *Liddlow* v. *Wilmot*.[61]

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[58] 1 Salk. 118.

[59] 39 T.L.R. 291, 293.

This wife has a comparatively small capital sum and no income, but I think no question of principle is involved. It was argued on behalf of the plaintiff that the court should not require a wife to resort to capital, and that the most that should be done is to treat her as having a notional income corresponding to a percentage rate on that capital. In my judgment, that is essentially a matter of fact to be determined in each particular case. I am not saying that if a wife has a house in which she lives, or an insurance policy of small surrender value, these assets must, necessarily, be sold or surrendered, either actually or notionally. A wife's means as a whole have to be considered, and, on the facts of this case, I think that Lynskey J. was right in finding that the realizable assets of the wife were sufficient, at any rate, to such an extent as to bar the claim of the plaintiff.

I would only add that Lynskey J. referred to the fact that the wife had not exhausted her remedies, because she could have applied to the court for alimony pendente lite as between the plaintiff and defendant. In this case I think that that consideration was rightly excluded by Lynskey J. The fact that the wife did not exhaust her remedies would not, I think, in a proper case, prevent an agency of necessity arising.

In this case I think no agency arose, and therefore this appeal fails.

Appeal dismissed.

Solicitors: *Manches & Co., for David Blank, Alexander & Co., Manchester; Sidney Torrance & Co., for Cecil Ellison, Manchester.*

E. D.

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[60] 32 L.J.Ch. 400.

[61] 2 Stark. 86.

C. A.

1952
June 26, 27;
July 21.

Somervell,
Birkett and
Hodson L.JJ.

LEEK AND MOORLANDS BUILDING SOCIETY *v.* CLARK AND OTHERS.

[Plaint No. H. 435A.]

Landlord and Tenant—Joint tenancy of husband and wife—Purchase of dwelling-house by husband—"Subject to existing tenancy"—Resale by husband, with a provision that vacant possession would be given on completion—Property mortgaged by sub-purchaser to plaintiff building society—Default of mortgagor—Action by mortgagees for possession—Rights of wife as joint tenant.

The defendant E. and his wife were joint tenants of a rent-controlled dwelling-house. By arrangement with defendant C., E. purchased from the landlords the reversion of their long leasehold interest, and then resold the property to C., who thereupon obtained a mortgage from the plaintiff building society. The agreement of sale was "subject to the existing tenancy," but the agreement of resale to C. contained the express provision that vacant possession would be given on completion. The wife of E., the other joint tenant, was aware of the sale and resale, but she did not know of the provision relating to vacant possession. In proceedings by the mortgagees for possession of the premises against C. and E., in which the wife of E. was joined as defendant, husband and wife claimed to remain in occupation as joint tenants:—

Held, affirming the decision of the county court judge, that in the absence of express words in the lease, or of authority, one of two joint lessees cannot surrender rights held jointly before the full period of the lease has run, and the wife was not estopped from asserting her rights as joint tenant.

In re Viola's Indenture of Lease [1909] 1 Ch. 244 approved.

Doe d. *Aslin* v. *Summersett* (1830) 1 B. & Ad. 135 distinguished.

Quære: Whether the principle laid down by Lord Tenterden in *Doe* d. *Aslin* v. *Summersett* applies to a surrender.

APPEAL from Judge Forbes, sitting at Birmingham county court.

Prior to December, 1950, the Burbury Investment Properties Ld., holders of a long leasehold interest, were the landlords of No. 83 Brays Road, Sheldon, in the city of Birmingham. Mrs. Ellison, one of the defendants, had lived in the house since 1940, at first with a husband, the tenant, whom she later divorced. After her marriage to the defendant, Mr. Ellison, the then landlords, Burbury Investment Properties Ld., accepted the Ellisons as joint tenants. Towards the end of 1950 the first defendant, Leslie William Clark, came on the scene, and the following documents came into existence: (1) An agreement of sale of the premises, No. 83 Brays Road, dated December 21, between Burbury Investment Properties Ld. as vendors and Mr. Ellison as purchaser for £800, "subject to the existing tenancy," i.e., the joint tenancy of Mr. and Mrs. Ellison; (2) an agreement of sale of the premises, dated January 1, 1951, between Mr. Ellison, as vendor, and Clark, as purchaser, for £1,650. The words "subject to the existing tenancy" had been deleted from the second agreement and there was substituted an express provision that "vacant possession will be given on completion." On January 5, 1951, Clark applied to the plaintiffs, the Leek and Moorlands Building Society, for a loan, representing that the house was for his own immediate residence. On January 16, 1951, the plaintiffs, by an allotment letter, notified Clark that they were prepared to advance to him £1,350, subject to vacant possession being obtained on or before completion. On March 12, 1951, completion took place in the following form: Burbury Investment Properties Ld. were the vendors, Nora Saunders was the mortgagee, Ellison the purchaser, and Clark the subpurchaser. The property was conveyed by the vendors, as beneficial owners, and Ellison assigning to Clark. On March 13, 1951, Clark mortgaged the property to the plaintiffs for £1,350. At some time after the sale Clark was said to have purported to let the premises to Mr. Ellison.

The first defendant, Clark, being in arrears with the instalments of principal and interest due under the mortgage deed, the plaintiffs, by originating summons in the Chancery Division, claimed possession against Clark and Ellison. An order for possession was made against Clark, and the action as against Ellison was remitted to the county court, where Mrs. Ellison was joined with her husband as defendant, it being claimed by the defendants that they were joint tenants of the premises and entitled to remain in occupation.

The county court judge decided against the plaintiffs' claim. He said: "I hold that there is a joint tenancy of Mr. and Mrs. "Ellison and when selling or putting an end to the joint tenancy "Mrs. Ellison was entitled to be consulted. I find Mrs. Ellison "knew in January, 1951, that Mr. Ellison had signed an agree-"ment to sell to Clark. She did not know about the mortgage "to the plaintiffs and nothing was said to her about moving out "of the premises. Clark had stated to her that if they moved "he would give them some money, but so far as she knew they "were only changing from one landlord to another. Mrs. "Ellison was not estopped from asserting the joint tenancy.

"Mere knowledge that Mr. Ellison had signed the contract did "not estop her. She did not know the terms of the contract; "she did not know the sale was with vacant possession. I do "not think Mrs. Ellison understood what was happening. She "did not authorize anyone to put an end to her joint tenancy."

The plaintiffs appealed.

L. A. Blundell and *A. K. Kisch* for the plaintiffs. A contract by a tenant to purchase the reversion terminates the tenancy at the date of the making of the contract: *Turner* v. *Watts*.[1] So also such a contract by one joint tenant terminates the tenancy of both joint tenants. A surrender by one tenant is sufficient authority for the two. If one gives or receives notice to quit that notice is sufficient to terminate the joint tenancy. In *Doe* d. *Aslin* v. *Summersett*[2] Lord Tenterden said: "A notice "to quit was duly served upon the defendant, but it was signed "by one only of the lessors of the plaintiff (though it imported "to be given on behalf of himself and the other lessor) and "whether that notice put an end to the defendant's tenancy was "the question. Two grounds were insisted upon by the lessors "of the plaintiff; one, that the adoption of this notice by the "other lessor of the plaintiff made it of the same validity as if "it had been signed by both of them; the other, that without "any such adoption, a notice to quit by one of the joint tenants "put an end to the tenancy as to both: and we are of opinion "that the latter ground is right." The plaintiffs here are only concerned to establish a surrender in law.

W. R. Handforth for Mrs. Ellison. In the absence of any provision, express or implied, an agreement to purchase would not operate to terminate the tenancy: *Doe* d. *Gray* v. *Stanion*.[3] The decision in *Turner* v. *Watts*[4] turned on the terms of the agreement. The husband here could not, by an act of which his wife had knowledge but did not understand, put an end to her rights as joint tenant. Clark had accepted rent from Mrs. Ellison from March until August, and that can only mean that if the husband had affected not only his own interest but also that of his wife in the tenancy, Clark had contracted afresh with the wife. *Doe* d. *Aslin* v. *Summersett*[5] is distinguishable in that it was concerned only with a periodic tenancy.

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[1] (1928) 97 L.J.K.B. 403.

[2] (1830) 1 B. & Ad. 135, 139.

[3] (1836) 1 M. & W. 695.

[4] 97 L.J.K.B. 403.

[5] 1 B. & Ad. 135.

[*In re Viola's Indenture of Lease* [6] and *In re Schar, decd.*,[7] also referred to.]

Cur. adv. vult.

July 21. SOMERVELL L.J. read the judgment of the court:— This is a claim for possession of certain premises by the plaintiffs as mortgagees. The mortgagor was the first defendant who was in arrears with the instalments of principal and interest due under the mortgage deed. The other defendants were and are in possession and claim to be so under a joint tenancy agreement. They rely, if necessary, on the protection of the Rent Acts. The proceedings started in the Chancery Division by originating summons. An order for possession was made against the first defendant, and the action as against Frank Ellison, then the only other defendant, was remitted to the county court. Mrs. Ellison, his wife, was then joined, as the tenancy alleged was a joint tenancy to them both. The county court judge decided against the plaintiffs.

[His Lordship stated the facts and continued:] Leaving aside for the moment the question of the tenancy being joint, it was submitted for the plaintiffs, on the authority of *Turner* v. *Watts*,[8] that an agreement by a tenant to purchase the reversion operates as a termination of the tenancy. That case, we think, turned on the terms of the agreement and in particular a provision that interest should accrue on the purchase price from the date of the agreement. In the absence of any provision, express or to be implied, an agreement to purchase would not so operate: *Doe* d. *Gray* v. *Stanion.*[9]

In the present case, we do not think, on any view, that the joint tenancy was extinguished by Mr. Ellison's agreement to purchase on December 21. The agreement says, in terms, subject to the existing tenancy. It is unnecessary to consider what would have been the position if there had been no sale on to Clark. By agreeing to sell to Clark with vacant possession Mr. Ellison was, it seems to us, agreeing that the tenancy would be surrendered on completion. If he had been the sole tenant, completion would itself presumably have effected a surrender. If there had been a tenancy in which he had no interest he would have been agreeing to procure that that tenancy would be surrendered or otherwise terminated on or before completion. In fact, the tenancy was one in which he and his wife were joint lessees, and, as will be seen, he never had any authority from her to surrender or terminate that tenancy. Though he is, of course, bound by the agreement which he signed, he may not have realized its effect. The question is whether, in these circumstances, the joint tenancy has been surrendered or otherwise terminated. We will take the events which ensued from the judgment of the county court judge.

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[6] [1909] 1 Ch. 244.

[7] [1950] W.N. 541.

[8] 97 L.J.K.B. 403.

[9] 1 M. & W. 695.

"On January 5, 1951, Clark makes application to the plaintiffs for a loan, representing that the house was for his own "immediate residence. On January 16, 1951, the plaintiffs, by "an allotment letter, notified Clark that they were prepared to "advance to him £1,350 subject to vacant possession being "obtained on or prior to completion. The date of completion "in the form of application for advance had been given as "January 21, 1951, by Clark, but this was not the date on which "the matter was completed. In fact it was on March 12, 1951, "and completion took place in this form: Burbury Investment "Properties Ld. were the vendors, Nora Saunders was the "mortgagee, Ellison was the purchaser, and Clark the sub-purchaser, and the property was conveyed, not by way of "vesting any interest in Ellison, who had only an interest in "equity, but the vendors, as beneficial owners, and Ellison "assigning to the sub-purchaser Clark. No interest in law was "actually vested in Ellison at any time. On March 13, 1951, "Clark mortgaged the property to the plaintiffs for £1,350. "Nobody seems to have inquired on behalf of the plaintiffs "whether the property was let or not. I am not criticizing this "omission. It seems to have been assumed that the property "was not let as Clark stated so. I should have thought the "building society would have checked this. The plaintiffs were "informed through their solicitors that Ellison agreed to give "vacant possession on completion. At some time or other Clark "accepted rent from Ellison. Up to March 5 rent had been "paid regularly weekly, in advance. At some time or other, "certainly not later than a few weeks after the sale and mortgage, Clark purported to let the premises to Ellison or to Mr. "and Mrs. Ellison, I do not know which, probably to Mr. Ellison "only."

[His Lordship then read the judge's findings as to the position of Mrs. Ellison and continued:] Counsel for the plaintiffs sought to rely on *Doe* d. *Aslin* v. *Summersett*[10] as supporting a submission that Mr. Ellison, by what he did, had brought the joint tenancy to an end. That case was dealing with a lessee from year to year of land which he held from two joint lessors. A notice to quit was served signed by one only of the joint lessors. It was argued that the other lessor had adopted the notice, but Lord Tenterden, who delivered the judgment of the Court of King's Bench, held that without any such adoption a notice to quit by one of the joint lessors, who were joint tenants, put an end to the tenancy as to both.

The ratio of the decision is, we think, to be found in the following sentence[11]: "Upon a joint demise by joint tenants" —that is, the lessors in that case—"upon a tenancy from year "to year, the true character of the tenancy is this, not that the "tenant holds of each the share of each so long as he and each "shall please, but that he holds the whole of all so long as he "and all shall please, and as soon as any one of the joint "tenants"—that is, the lessors in that case—"gives a notice to "quit, he effectively puts an end to that tenancy." It is to be noted that Lord Tenterden was dealing with a notice to quit in respect of a periodic tenancy. He was not dealing with a right to determine a lease for say 21 years at the end, say, of the seventh or fourteenth year. Nor was he dealing with surrender.

There is, we think, force in the submission made on behalf of the plaintiffs, that in the case of a periodic tenancy Lord Tenterden's principle would apply when there were joint lessees. A periodic tenancy continues from period to period unless the notice agreed or implied by law is given. But if one of two joint lessees who "hold the whole" wishes it not to continue beyond the end of a period, it might well be held that it did not continue into a new period. That would happen only if all, that is, the joint lessees, shall please.

If one considers a lease to joint lessees for a term certain with a right of renewal, it would be obvious, we think, that both must join in requiring a renewal. A periodic tenancy renews itself unless either side brings it to an end. But if one of two or more joint lessees does not desire it to continue, we would have thought that it was in accordance with Lord Tenterden's principle, and with common sense, that he should be able to make that effective. The question is whether the principle has any application to a surrender. There seems to be no authority on this point, though there are cases dealing with a right to determine at a date within the period of the tenancy.

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[10] 1 B. & Ad. 135.

[11] Ibid. 140.

In *Easton* v. *Penny* [12] the lease in question was for 21 years determinable at the end of 14 years. There was a single lessor and two lessees. A notice in writing to determine was given which, on the face of it, expressed an intention of one only of the two joint lessees to determine at the end of 14 years. Romer J. decided this was a bad notice. That decision could have been based on the terms of the clause as to determination. It provided that if the lessor or the lessees or their respective heirs, executors, administrators and assigns should be desirous of terminating the term of 21 years at the expiration of the fourteenth year thereof, it should be lawful for *him or them*, or his or their representatives or assigns so to do, on giving one year's notice in writing—of their intention so to do. Romer J. did not expressly refer to the words we have italicized, but referred to the fact that the notice had to be in writing.

In re Viola's Indenture of Lease,[13] to which we were referred, dealt with a right of determination conferred on husband and wife as joint lessees at the end of three years in a lease for 15¾ years. The notice was given by the husband only, and its validity was disputed on this ground. The clause giving the right to determine provided that if "the lessees should be desirous of "terminating, etc." In the course of the argument Warrington J. said: "You want me to read the words 'if the lessees' in the "proviso as if they were 'if either of the lessees.'" This was the basis of his decision. He did, in distinguishing *Doe* d. *Aslin* v. *Summersett*,[14] point out that that case turned, at any rate in part, on the effect of a tenancy from year to year.

It may be difficult to imagine a case in which, so far as a right of determination before the full period of the lease has run is concerned, the problem would not be solved by the express terms of the clause. If it was not so solved we think that such a right would be exercisable only if all desired to exercise it. They all have the right to the full term, and all must concur if this right is to be abandoned. It is also to be noted that in that case the court was asked to infer an authority in the husband to act on behalf of his wife. It declined to do so. In the present case there is an express finding of absence of authority.

Even if we are wrong in what we have said with regard to a right to determine within the period of the lease as distinct from

[12] (1892) 67 L.T. 290.

[13] [1909] 1 Ch. 244.

[14] 1 B. & Ad. 135.

a right to terminate a periodic tenancy, we would have thought it plain that one of two joint lessees cannot, in the absence of express words or authority, surrender the rights held jointly. If property or rights are held jointly, prima facie a transfer must be by or under the authority of all interested. The answer suggested to this is the principle laid down in *Doe* d. *Aslin* v. *Summersett.*[14] That case, for reasons which we have given, is not in our view an exception to the rule we have just stated. It is an illustration, in a highly technical field, of the general principle that if a joint enterprise is due to terminate on a particular day, all concerned must agree if it is to be renewed or continued beyond that day. To use Lord Tenterden's phrase, it will only be continued if "all "shall please."

For these reasons we think the conclusion of the county court judge was right, though it is clear that the argument was considerably developed in the hearing before us. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *J. E. Lickfold & Sons, for Rollason, Clift & Holmes, Birmingham; Saunders, Sobell & Co., for Stanley A. Coleman, Birmingham.*

A. W. G.

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[14] 1 B. & Ad. 135.

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* BOOTS CASH CHEMISTS (SOUTHERN) LD.

1952
July 16.

Lord Goddard C.J.

[1951 P. No. 1413.]

Poisons—Sale of poisons—Self-service system—Selection of articles by customer from shelves—Payment in presence of qualified pharmacist—Pharmacy and Poisons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (*iii*).

Contract—Offer and acceptance—Sale of goods—Self-service—Time of sale.

The defendants' shop at Edgware consisted of a single room adapted to the "self-service" system. In that room was a "chemist's department," under the control of a registered pharmacist, in which various drugs and proprietary medicines, included, or containing substances included, in Part I of the Poisons List compiled under section 17 (1) of the Pharmacy and Poisons Act,

1952

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN
v.
BOOTS CASH CHEMISTS (SOUTHERN) LD.

1933, but not in Schedule I to the Poisons Rules, 1949, were displayed on shelves in packages or other containers with the price marked on each. A customer on entering the room was given a basket and then selected the articles that he wished to buy from the shelves, put them in the basket and took them to the cashier's desk at one of the two exits. The cashier scrutinized the articles, stated the total price and received the money: and the pharmacist in the control of the department supervised that part of every transaction involving the sale of a drug which took place at the cash desk and was authorized to prevent the removal of any drug from the premises.

In an action brought by the plaintiffs alleging that the provisions of section 18 of the Act requiring the sale of poisons included in Part I of the Poisons List to be effected by or under the supervision of a registered pharmacist were infringed by the defendants:—

Held, that the display of the articles on the shelves, though coupled with an invitation to the customer to select and take any that he wished to buy from the shelves, did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to make an offer to buy: and that offer was made and accepted at the cashier's desk and the sale was therefore effected under the supervision of a registered pharmacist, as required by the Act.

Semble, that even if it could be said that the sale was effected by the customer taking the article from the shelf, as the pharmacist could prevent its removal from the premises, the sale was still effected under his supervision.

SPECIAL CASE stated by the parties under R.S.C. Ord. 34, r. 1.

The defendants carried on a business comprising the retail sale of drugs at their premises at Edgware, which were entered in the register of premises kept pursuant to section 12 of the Pharmacy and Poisons Act, 1933, from which they regularly sold drugs by retail. The premises comprised a single room so adapted that customers might serve themselves and the business there was described by a printed notice at the entrance as "Boot's "Self-Service." On entry each customer passed a barrier where a wire basket was obtained. Beyond the barrier the principal part of the room, which contained accommodation for 60 customers, contained shelves around the wall and on an island fixture in the centre, on which articles were displayed. One part of the room was described by a printed notice as the "Toilet Dept.," and another part as the "Chemists' Dept." On the shelves in the chemists' department drugs, including proprietary medicines, were severally displayed in individual packages or containers with a conspicuous indication of the retail price of each. The drugs and proprietary medicines covered a wide range and one section of the shelves in the chemists' department was devoted exclusively to drugs which were included in or which contained substances included in Part I of the Poisons List referred to in section 17 (1) of the Pharmacy and Poisons Act, 1933; no such drugs were displayed on any shelves outside the section to which a shutter was fitted so that at any time all the articles in that section could be securely inclosed and excluded from display. None of the drugs in that section came within the First Schedule to the Poisons Rules, 1949 (S.I. 1949, No. 539).

The staff employed by the defendants at the premises comprised a manager, a registered pharmacist, three assistants and two cashiers, and during the time that the premises were open for the sale of drugs the manager, the registered pharmacist, and one or more of the assistants were present in the room. Each customer selected from the shelves the article that he wished to buy and placed it in the wire basket; in order to leave the premises the customer had to pass by one of two exits at each of which was a cash desk where a cashier was stationed who scrutinized the articles selected by the customer, assessed the value and accepted payment. The chemists' department was under the personal control of the registered pharmacist, who carried out all his duties at the premises subject to the directions of a superintendent appointed by the defendants in accordance with the provisions of section 9 of the Act. The pharmacist was stationed near the poisons section, where his certificate of registration was conspicuously displayed and was in view of the cash desks. In every case involving the sale of a drug the pharmacist supervised that part of the transaction which took place at the cash desk and was authorized by the defendants to prevent at that stage of the transaction, if he thought fit, any customer from removing any drug from the premises. No steps were taken by the defendants to inform customers before they selected any article which they wished to purchase of the pharmacist's authorization.

On April 13, 1951, at the defendants' premises, two customers, following the procedure outlined above, respectively purchased a bottle containing a medicine known as compound syrup of hypophosphites, containing 0.01 % W/V strychnine, and a bottle containing medicine known as famel syrup, containing 0.023 % W/V codeine, both of which substances are poisons included in Part I of the Poisons List, but, owing to the small percentages of strychnine and codeine respectively, hypophosphites and famel syrup do not come within the First Schedule to the Poisons Rules, 1949.

The question for the opinion of the court was whether the sales instanced on April 13, 1951, were effected by or under the supervision of a registered pharmacist in accordance with the provisions of section 18 (1) (*a*) (iii) of the Pharmacy and Poisons Act, 1933.[1]

H. V. Lloyd-Jones Q.C. and *T. Dewar* for the Pharmaceutical Society. This case turns on the construction of section 18 (1) (*a*) (iii) of the Pharmacy and Poisons Act, 1933, but the real question at issue is whether under the self-service system of trading the sale in fact takes place at the point where the customer takes from the shelves the article that he wishes to buy or whether it takes place at the point where the money is paid and the pharmacist is stationed.

The self-service system of trading inherently invites the customer to purchase; the price is fully displayed on the articles which are offered for sale and the taking of an article by a customer is an acceptance of the offer. Even if it be the law that a customer has no right to demand goods merely because they are displayed in a shop window the position is different where goods are displayed for sale inside a self-service shop. There are indications to that effect in *Wiles* v. *Maddison*.[2] It is submitted that the contract is made and the property passes at the moment a customer takes an article. [Cheshire and Fifoot's Law of Contracts, 1st ed., p. 21, and *Timothy* v. *Simpson* [3] referred to.] The sales in question, therefore, were not contracts or sales made under the supervision of the pharmacist.

[Lord Goddard C.J. referred to *Carlill* v. *Carbolic Smoke Ball Co.*[4]]

What takes place under the self-service system is an innovation; it is a completely new system of trading and is a variant of an automatic sale. Regard must be had to section 22 of the Pharmacy and Poisons Act, 1933 [5]; the legislature thought proper to make provisions for the supervision of sales of poison, to which importance was plainly attached, and it was intended that poisons should not be sold without supervision. What is important is whether or not the pharmacist can intervene at the crucial moment.

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[1] Pharmacy and Poisons Act, 1933, s. 18: "(1) . . . it shall not be lawful "—(*a*) for a person to sell any poison "included in Part I of the Poisons "List, unless—(i) he is an authorized "seller of poisons; and (ii) the sale is "effected on premises duly registered "under Part I of this Act; and (iii) "the sale is effected by, or under the "supervision of, a registered pharmacist."

[2] [1943] 1 All E.R. 315.

[3] (1834) 6 C. & P. 499.

[4] [1893] 1 Q.B. 256.

[5] Pharmacy and Poisons Act, 1933, s. 22: "It shall not be lawful for a "poison to be exposed for sale in, or "to be offered for sale by means of, "an automatic machine."

[LORD GODDARD C.J. referred to the Sale of Goods Act, 1893.]

By section 17 (2) of the Sale of Goods Act, 1893, the property passes when it is intended to pass. The circumstances in this case plainly point to an intention that the sale should take place at the particular spot where the customer takes the article.

[LORD GODDARD C.J. In a bookshop, where books are lying about, people often look at the books and a customer will frequently pick up a book he wants to buy and take it to the bookseller.]

The legislature intended to interpose the possibility of guidance or veto on the part of the pharmacist when a customer is selecting poisons, and in this case, even though the time of payment is postponed until the cashier is reached so that payment takes place in the presence of the pharmacist, it is submitted that the sales in question were not effected in accordance with the provisions of the section.

Glyn-Jones Q.C. and *G. D. Everington* for the defendants. The other statutory provisions with regard to poisons are proper material to assist in the construction of section 18 of the Pharmacy and Poisons Act, 1933. There are elaborate rules for the packing and sale of poisons and the regulations impose on different classes of poisons precautions of varying degrees of stringency. Poisons such as those in question are subject to very little control apart from that contained in section 18, and when it is remembered that they are of great variety and of very little danger it can be appreciated that the legislature relaxed the precautions. The construction of section 18, therefore, should not be considered in relation to poisons generally.

The statement that the self-service method of trading is an innovation is challenged. It may be a novelty of a kind, but for the last 50 years at least shopkeepers—particularly ironmongers and shopkeepers in market towns—have been in the habit of displaying goods, clearly marked with the price, in their shops and even in the street outside, and it has been the custom for a purchaser to pick up the article he wished to buy, take it to the assistant inside the shop and pay the money, but the purchase was not complete until the money was paid. To display goods marked with their price has been a method of shopkeeping ever since shops first existed. Under the self-service system the principle is the same; the mere fact that the customer picks up the article himself off a shelf instead of it being, perhaps, fetched by an assistant, makes no difference. The only difference is that the shopkeeper economizes by not providing assistants to take the goods off the shelves. It is submitted that it would have made no difference if the dress in *Timothy* v. *Simpson* [6] had been hanging on a nail outside the shop. In essence the display of goods marked with their price is no more than an invitation; if it were otherwise their display in a position out of the customer's reach would amount to an invitation, whereas if they were within the customer's reach and he could and did take them, that would be a contract. An invitation to a customer to select the goods he wishes to buy cannot have the legal effect of a transaction of sale merely because the customer takes them; if so a customer might not, if he wished, be able to put the article back, or he could take it and leave the shop without paying for it, saying that the property had passed to him when he picked it up. "Sale" in the statute must mean the transaction whereby the physical property passes; the transaction in the present case is not unconditional and it is not completed, nor does the property pass, until payment.

In Sutton and Shannon on Contracts, 4th ed., at p. 24, it is said: "Generally speaking, a trader's price list is not an offer to "sell the goods comprised in it at the stated prices, nor does the "mere placing of priced goods in a shop window amount to an "offer to sell at the named price, or to sell at all. In both cases "it is the intending purchaser who makes the offer." That statement is adopted and, it is submitted, supplies the real answer in the present case.

H. V. Lloyd-Jones Q.C. replied.

Lord Goddard C.J. This is a special case stated under Ord. 34, r. 1, by agreement between the parties concerning the application of section 18 of the Pharmacy and Poisons Act, 1933.

[His Lordship stated the facts substantially as set out above and continued:] The question which I have to decide is whether the sale is completed before or after the intending purchaser has passed the scrutiny of the pharmacist and paid his money, or, to put it in another way, whether the offer which initiates the negotiations is an offer by the shopkeeper or an offer by the buyer.

In the well-known case of *Carlill* v. *Carbolic Smoke Ball Co.*[7] the company offered compensation to anybody who, having used a carbolic smoke ball for a certain length of time in a prescribed manner, contracted influenza. One of the inducements held out to people to buy the carbolic smoke ball was the representation that it was a specific against influenza. The plaintiff, who used it according to the prescription which was given, nevertheless, as might have been expected, contracted influenza. She then sued the Carbolic Smoke Ball Co. for, and recovered, the compensation. In the Court of Appeal Bowen L.J. said [8]: "There can be "no doubt that where a person in an offer made by him to another "person, expressly or impliedly intimates a particular mode of "acceptance as sufficient to make the bargain binding, it is only "necessary for the other person to whom such offer is made to "follow the indicated method of acceptance; and if the person "making the offer, expressly or impliedly intimates in his offer "that it will be sufficient to act on the proposal without com"municating acceptance of it to himself, performance of the "condition is a sufficient acceptance without notification."

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[6] 6 C. & P. 499.

[7] [1893] 1 Q.B. 256.

Mr. Lloyd-Jones has said that in this case the defendants invite the public to come into their shop and say: "Help yourself "to any of these articles, all of which are priced," and that that is an offer by the defendants to sell to any person who comes into the shop any of the articles so priced, which is accepted by any person who helps himself to any one of those articles. Mr. Glyn-Jones, on the other hand, contends that there is nothing revolutionary in this kind of trading, and that it amounts to no more than the exposure of goods which a shopkeeper sometimes makes either outside or inside his premises, while at the same time he leaves some goods behind the counter. I think that it is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think I ought to hold that that principle is completely reversed merely because there is a self-service scheme, such as this, in operation. In my opinion it comes to no more than that the customer is informed that he may himself pick up an article and bring it to the shopkeeper with a view to buying it, and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact, the offer is an offer to buy, and there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases out of a 100 he will sell and, if so, he accepts the customer's offer, but he need not do so. The very fact that the supervising pharmacist is at the place where the money has to be paid is an indication to the purchaser that the shopkeeper may not be willing to complete a contract with anybody who may bring the goods to him.

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[8] [1893] 1 Q.B. 256, 269.

Ordinary principles of common sense and of commerce must be applied in this matter, and to hold that in the case of self-service shops the exposure of an article is an offer to sell, and that a person can accept the offer by picking up the article, would be contrary to those principles and might entail serious results. On the customer picking up the article the property would forthwith pass to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable. On the other hand, if a customer had picked up an article, he would never be able to change his mind and to put it back; the shopkeeper could say, "Oh no, the property has passed and you must pay the "price."

It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying "I accept your offer." I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said "I "want to buy this book" and the shopkeeper says "Yes." That would not prevent the shopkeeper, seeing the book picked up, saying: "I am sorry I cannot let you have that book; it is the "only copy I have got and I have already promised it to another "customer." Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale, take place under the supervision of the pharmacist. That is sufficient to satisfy the requirements of the section, for by using the words "the sale is effected by, or under the supervision of, a registered "pharmacist" the Act envisages that the sale may be effected

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by someone not a pharmacist. I think, too, that the sale is effected under his supervision if he is in a position to say "You "must not have that; that contains poison," so that in any case, even if I were wrong in the view that I have taken on the question as to when the sale was completed, and it was completed when the customer took the article from the shelf, it would still be effected under the supervision of the pharmacist within the meaning of section 18.

There must therefore be judgment for the defendants.

Judgment for the defendants.

Solicitors: *A. C. Castle; Masons.*

J. F. L.

RAWLANCE *v.* CROYDON CORPORATION.

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July 8, 9, 25.

Somervell, Denning and Romer L.JJ.

[Plaint No. H. 524.]

Housing—House in some respects unfit for human habitation—Notice from local authority to do specified repairs—Service on landlord—Tenant liable to do indoor repairs—Premises rent controlled—"Person having control of house"—"Person who receives the "rack-rent . . . or who would so receive it if the house were let at a "rack-rent shall be deemed to be the person having control of the "house"—"'Rack-rent' means rent which is not less than two-"thirds of the full net annual value of the house"—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 9 (4).

By section 9 (1) of the Housing Act, 1936, local authorities are empowered to serve upon the person having control of a house which is officially reported to be in any respect unfit for human habitation, a notice requiring him to execute such works, specified in the notice, as will render the house fit for human habitation. By subsection (4) the person who receives the rack-rent of the house or who would receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house, and the expression "rack-rent" means rent not less than two-thirds of the full net annual value of the house. In ascertaining the full net annual value the fact that the rent of the house is controlled by the Rent Restriction Acts is to be taken into consideration, for they restrict the value of the house to the landlord, and since the standard rent of such a house, plus statutory increases, is the full amount which the landlord can receive from the tenant, that rent is the full net annual value of the house within the meaning of subsection (4).

Thus, where a house was let at a controlled rent of £45 it was held that the landlord was receiving a rack-rent though that rent was less than two-thirds of the net annual value of the house on the hypothesis that there were no statutory restrictions on the rent and therefore the notice to repair was properly served on him.

Poplar Assessment Committee v. *Roberts* [1922] 2 A.C. 93 distinguished.

Reasoning of Atkin L.J. in *Roberts* v. *Poplar Assessment Committee* [1922] 1 K.B. 25, 53 applied.

APPEAL from Judge Sir Gerald Hurst Q.C., sitting at Croydon county court.

The respondent, Mr. Alma du Hamel Rawlance, was the owner of the freehold of a dwelling-house, No. 3 Burlington Road, Thornton Heath, which was let on a yearly tenancy at a rent of £45 per annum, exclusive of rates, the tenant being liable for internal and the landlord for external repairs. The house was within the Rent Restriction Acts. It had been let in 1914 at a rent of £35 per annum, the rent of £45 representing that sum plus the increases permitted under the Acts. That rent was admittedly less than two-thirds of the value of the house, if that value were to be calculated on the assumption that the house was not within the Rent Restriction Acts. An official of the Croydon Corporation having reported that the house was unfit for human habitation by reason of the condition of the kitchen floor, the corporation served on the landlord a notice under section 9 of the Housing Act, 1936,[1] requiring him to execute certain specified works which, in their opinion, would render the house fit for human habitation.

The landlord appealed and the county court judge held, applying *Poplar Assessment Committee* v. *Roberts*,[2] that in ascertaining the full annual value of the house the Rent Restriction Acts were to be disregarded, and as £45 was less than two-thirds of that value ascertained on that hypothesis the landlord was not in receipt of a rack-rent, that he was not the person who would receive the rack-rent if the house were so let, and that therefore the notice was improperly served on him. The corporation appealed.

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[1] Housing Act, 1936, s. 9 (1): "Where a local authority, upon consideration of an official representation, or a report from any of their officers . . . are satisfied that any house . . . is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time . . . as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation."

Subs (4): "For the purposes of this Part of this Act, the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house. In this subsection the expression 'rack-'rent' means rent which is not less than two-thirds of the full net annual value of the house."

[2] [1922] 2 A.C. 93.

M. Lyell for the corporation.

M. Hoare for the landlord.

The arguments of counsel sufficiently appear in the judgments.

SOMERVELL L.J. stated the facts, read section 9 of the Housing Act, 1936, and continued:—It is common ground that the rent of £45 is less than two-thirds of the net annual value on the hypothesis that there were no statutory restrictions on the rent. On that hypothesis, therefore, the landlord would not be receiving a rack-rent. There would remain the question whether he was within the latter words of subsection (4) as the person who would receive the rack-rent if the house were so let. It is clear, in the first place, that the section is not concerned with the liability as between the person having control and a lessee for the repairs required by the notice. If there is a lessee who is liable under covenant for the repairs in question the person having control is required to do them and is left to exercise any remedy he may have under the covenant to recoup himself.

The county court judge held that the Rent Restriction Acts could not be treated as relevant to the meaning of the words "rack-rent" as defined, and he was led to this conclusion by the reasoning of the House of Lords in *Poplar Assessment Committee* v. *Roberts.*[2] He therefore held first that the landlord was not in receipt of a rack-rent. He further held that the landlord was not the person who would receive the rack-rent if the house was so let. The notice was therefore improperly served. With respect I have come to a different conclusion. The first question turns on whether in arriving at the "full net annual value" in the context of this subsection one has to have regard to the limitations placed by the Rent Restriction Acts on what is recoverable by the landlord as rent in respect of the annual value.

Poplar Assessment Committee v. *Roberts*[2] was relied on by each party to the appeal. Mr. Hoare, for the landlord, relied on the decision, and Mr. Lyell, for the local authority, on the reasoning. In that case the courts had to consider the effect of the Rent Restriction Acts in the application of the definition of

[2] [1922] 2 A.C. 93.

gross value in the Valuation (Metropolis) Act, 1869, which is as follows: "The term 'gross value' means the annual rent which "a tenant might reasonably be expected, taking one year with "another, to pay for an hereditament, if the tenant undertook to "pay all usual tenant's rates and taxes . . . (*b*) and if the landlord "undertook to bear the cost of the repairs and insurance, and the "other expenses, if any, necessary to maintain the hereditament "in a state to command that rent." It is unnecessary to consider whether, apart from the Rent Restriction Acts, the definition would in respect of any particular premises lead to the same figure as "full net annual value." The definitions are both dealing with the value of premises. The Divisional Court and this court, by a majority, held that the "gross value" of a house to which the Rent Restriction Act applied could not be greater than the standard rent together with the permitted increases.

The first relevant question in the case stated was whether the Rent Restriction Act was to be taken into account, and the second question was whether the highest gross value which could be placed was the standard rent plus permitted increases. Atkin L.J., who was of the majority, dealt with these two questions as follows[3]: "Applying the principles discussed above to the present "case, the first question to be answered in the special case is: "(2) Whether the said Rent (Restrictions) Act, 1920, in its "application to the said hereditament is to be taken into account "in arriving at the valuation of the said hereditament under and "for the purposes of the Valuation (Metropolis) Act, 1869. In "my opinion this question only admits of an affirmative answer. "'The problem is to ascertain, according to the statute, what a "'tenant from year to year might reasonably be expected to give "'as rent. For the solution of that problem it appears to me "'that apart from the decisions, as to which I will say a word "'presently, all that could reasonably affect the mind of the "'intending tenant ought to be considered.' That is from the "judgment of Lord Halsbury in *Cartwright* v. *Sculcoates Union*.[4] "To suggest that in the present time the mind of an intending "tenant of a house to which the Rent (Restrictions) Act applies "would not be reasonably affected by the provisions of the Rent "(Restrictions) Act appears to me to border upon the ridiculous. "I have already said that in my view the decisions, so far from "indicating a contrary view, affirm the necessity of taking such

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[3] [1922] 1 K.B. 25, 53.

[4] [1899] 1 Q.B. 666, 673.

"provisions into consideration. I need say no more upon this "question.

"The second question, No. 3 in the special case, is: Whether "the highest gross value which can be assigned to and placed "upon the said hereditament . . . is the standard rent plus the "highest increases of rent provided for in section 2 (1) (*c*) and (*d*) "of the said Act. In my opinion the answer is again in the "affirmative. I have already referred to *Sculcoates Union* v. "*Dock Co. at Kingston-upon-Hull*,[5] which seems to me to admit "of but one answer to this question. If no higher rent than the "standard rent and statutory increases is enforceable, as a matter "of common sense that seems to be the limit of the rent a "tenant can be reasonably expected to give. But it is suggested "the tenant is not prohibited from giving or the landlord from "receiving more than the standard rent; all that is provided is "that the excess shall not be enforceable; the assessment com-"mittee may consider that the demand for houses may lead the "willing tenant to offer and the landlord to accept an increase "above the standard rent which both parties will know to be "unenforceable but which will still be paid; and in this particular "case, seeing that a large premium was recently paid for the "lease, it is said that such an agreement might readily be "inferred. I think that the answer is that when the Valuation "(Metropolis) Act speaks of rent it means rent, a sum legally "enforceable; and is not contemplating a sum legally enforceable "plus a voluntary gift; still less a voluntary gift which after "payment can at any time be recovered back." Those last words refer to section 14 of the Rent Act of 1920.

The House of Lords[6] reversed that decision. They decided that the gross value was not limited to the standard rent plus increases, and that the Rent Act was not to be taken into account. Lord Carson dissented on both points and Lord Sumner, who agreed on the first point, expressed no opinion on the second. Mr. Hoare for the landlord relies on this decision. On the face of it, it would seem to assist him. In applying a somewhat similar formula the Rent Act was disregarded. Mr. Lyell for the local authority, as I have said, relies on the reasoning, which he submits assists his case. I have come to the conclusion that a study of the reasoning in relation to the passage I have cited from Atkin L.J. supports the borough council in this appeal.

It is, I think, desirable to cite the relevant passages from the speeches rather than seek to summarize them. Lord Buckmaster said this [7]: "It is round the true meaning of this section that "the dispute centres. The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, "unless, indeed, it happens to be the rent that the imaginary "tenant might reasonably be expected to pay in the circumstances "mentioned in the section. But although the tenant is imaginary, "the conditions in which his rent is to be determined cannot be "imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was "stated by this House in *Port of London Authority* v. *Orsett* "*Union Assessment Committee*,[8] and I do not think that the "language which I there used needs to be modified or explained; "but those words related entirely to determining the value of the "occupation to the occupier, excluding, of course, any element "due to his skill, industry, or other strictly personal qualifications. "In the present case the respondent seeks to introduce into these "words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the "provisions of the Rent Restriction Act have not in any way "made his occupation less beneficial. It is the landlord who is "affected, and he, as landlord, is not the subject of assessment, "nor can his interest in the property be considered for the purpose "of determining what that assessment should be. If, however, "the rent which has to be ascertained under the section is the "real rent, then the fact that that cannot be increased will have "a material effect upon the valuation. I agree, however, with "what was said by counsel for the appellants that so to interpret "the statute would be to deal with something which was nothing "but a measure of value in such a manner as completely to "destroy the very object for which that measure was set up. "Just as the tenant is hypothetical, so also is the rent; it is "only used as a standard which must be examined without regard "to the actual limitation of the rent paid by virtue of covenant "as between landlord and tenant, and also, as I regard it, to "statutory restrictions that may be imposed upon its receipt. "From the earliest time it is the inhabitant who has to be taxed. "It is in respect of his occupation that the rate is levied, and "the standard in the Act is nothing but a means of finding out "what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably

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[5] [1895] A.C. 136.

[6] [1922] 2 A.C. 93.

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[7] [1922] 2 A.C. 93, 103.

[8] [1920] A.C. 273, 305.

" be expected to pay is the rent which, apart from all conditions " affecting or limiting its receipt in the hands of the landlord, " would be regarded as a reasonable rent for the tenant who " occupied under the conditions which the statute of 1869 " imposes."

Lord Buckmaster then found support for his conclusion in the cases dealing with local authorities, statutory undertakers and charitable trusts, which had held that premises could be rated although they could not be let.

Lord Atkinson also referred to and relied on these cases, and the ratio of his opinion is, I think, summarized in the following sentence [9]: " What the ratepayer is, under both the Act of 1836 " and that of 1869, rated in respect of is decided by many cases " in this House to be the beneficial occupation of a hereditament. " And if he is in enjoyment of this species of occupation, he must " be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, " and though no rent is or could be received in respect of it."

Lord Sumner said this [10]: " Rating is a process between an " occupier and a rating authority, to the determination of which " the landlord and the lessee are strangers. It may be observed " that the phrase is ' might be expected to pay '; it does not go " on to say ' and the landlord might be able to exact.' If, as is " contended, ' rent ' is throughout rigidly restricted to its meaning " as a term of art, and the measure of value thus applied by " hypothetical hands is the real thing, the result would be that " the occupier, who already has been enriched under the Rent " Restrictions legislation by receiving a statutory present of part " of the value of his landlord's property, would profit still further " and equally unmeritoriously by escaping from the rates, which " the hereditament ought to bear, to the prejudice of other less " fortunate occupiers. I say ' ought to bear,' because the only " justification for the restriction is that the hereditament is really " worth more by the year in the market than the landlord is " allowed to charge, but that it is inexpedient that he should have " the benefit of it."

It is perhaps to be noted in passing that the definition in the Parochial Assessment Act of 1836, now to be found in section 68 of the Rating and Valuation Act, 1925, which has been held to be identical in meaning (*London County Council* v. *Erith Churchwardens* [11]), had a differently worded definition. It referred to

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[9] [1922] 2 A.C. 93, 107.

[10] Ibid. 116.

[11] [1893] A.C. 562, 595.

" the rent at which a hereditament might reasonably be expected " to let." It would be wrong, therefore, to regard Lord Sumner's opinion as based on the fact that the definition in the statute under consideration was worded in the other sense.

Lord Parmoor said this[12]: " Under 43 Eliz. c. 2, rates are " to be levied upon every occupier of lands, houses, etc. The " distinction between occupier and owner, in this connexion, is " of primary importance. The occupation value of property may " be, and often is, distinct from its value to the owner. This " distinction would probably be emphasized where an artificial " statutory maximum is fixed, and a statutory restriction prevents " an owner from recovering from any tenant a greater amount, " as rent, than the statutory maximum. It has long been recog- " nized that actual rents based on the contractual relationship " between tenant and landlord are not the test of the value of " a property for rating purposes. I do not think that there is any " difference in this respect between a contractual or a statutory " rental." This reasoning seems to me to support the argument for the council. The present section is in the first instance in search of an actual landlord receiving an actual rent. His interest is clearly affected by the Rent Acts, as is emphasized in the passages which I have cited. The observations in the judgment of Atkin L.J. did not prevail because rating is not concerned with value to the landlord but to the occupier. The section with which we are dealing is concerned with value to the landlord. If Parliament limits that value then that limitation must, in my opinion, operate on the " full net annual value " of the house for the purpose of the definition.

Reliance was sought to be placed on a line of reasoning which is to be found in the dissenting judgment of Bankes L.J., and which was approved by Lord Buckmaster in the last sentence of his speech. Bankes L.J. suggested that one could take into account voluntary payments which a tenant might make in excess of the standard rent. None of the other noble and learned Lords expressed approval of that line of reasoning, and it was not the primary ratio of Lord Buckmaster's opinion. I agree with what Atkin L.J. said with regard to this in the passage I have cited.

Mr. Hoare, for the landlord, emphasized that an owner may realize the full value in many ways. He may occupy himself, he may have a service occupancy or tenancy, he may sell the house with vacant possession, and so on. The answer to this argument is that the part of the section which I am now considering is operating on a tenancy and the quantum of the actual rent being paid. It presupposes actual conditions in which the Rent Acts control the rent to be paid, that is, the value to the landlord. Reliance was placed on the word " full." It would be remarkable, if the Rent Acts would otherwise be applicable, that their operation should have been excluded not by saying so, but by the word " full." The word I think is natural as making clear that the proportion is to be a proportion of the highest figure which could reasonably express the net annual value. Mr. Hoare also submitted that if the appellant succeeded the court would be construing substantially similar formulae in one way in one Act and in another way in another. I find no difficulty about this for the reason given in the passage which I have cited from Lord Sumner's speech. Both Acts are concerned with value. The Rent Acts control and restrict the value to the landlord with which we are concerned, while leaving unaffected the value to the occupier with which rating is concerned.

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[12] [1922] 2 A.C. 93, 118.

In the present case I therefore come to the conclusion that the " full net annual value " was £45, and, as this was the amount of the rent that the landlord was receiving, he was receiving a rack-rent and the notice was properly served on him.

It was argued for the council that, assuming they were wrong on the first point, the landlord was the person who " would so " receive it," that is, a rack-rent, " if the house were let at a " rack-rent " as provided by subsection (4) of the section being considered. We were referred for the landlord to *Truman, Hanbury, Buxton & Co.* v. *Kerslake.*[13] That case dealt with similar words in a definition of " owner " in the Public Health (London) Act, 1891. In that case there was a lease for 39 years at a rent which was not a rack-rent. It was held by the Divisional Court that as the lessee had power to let at a rack-rent he was the person who would receive the rack-rent if the premises were so let. All I wish to say on that point is that it would not, I think, necessarily apply to a tenant of rent-restricted premises. On the hypothesis that the standard rent with increases is not a rack-rent, the tenant could not himself let at a rack-rent. I find it unnecessary to pursue what the consequences would be, because if I am right in my conclusion on the first point the question does not arise here and seems unlikely to arise in other cases.

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[13] [1894] 2 Q.B. 774.

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The case, which, if I may say so, was very well argued on both sides, is not an easy one, but for the reasons I have given I would allow the appeal.

Denning L.J. We are here concerned with a dwelling-house to which the Rent Restriction Acts have applied ever since they first started in 1915. The rent in 1914 was £35 a year, which has been raised by permitted increases to £45 a year. No more rent can be recovered for the house so long as it is let unfurnished as a separate dwelling. £45 is the maximum rent which can be charged, or at any rate recovered for it. The kitchen floor is now in a bad condition. It is affected by dry rot. As between landlord and tenant, it is clear that the tenant ought to repair it, because the tenancy is on the terms that the tenant is liable for internal repairs. But the tenant has done nothing about it. The house is unfit for human habitation, and the local authority have decided that it must be made fit. In order to get the work done they have served a notice on the landlord requiring him to repair it. The landlord says that the notice ought not to be served on him but on the tenant. He says that the rent he gets for the house is so low that he is no longer "the person having "control of the house"; and that if anyone has control, it is the tenant and not the landlord. The county court judge has accepted this contention. The local authority appeal to this court.

The county court judge based himself on a case which decided that the Rent Restriction Acts are to be ignored in assessing rateable value. It is *Poplar Assessment Committee* v. *Roberts*.[14] I do not think that case has any application to the present case. Rating concerns the value to the occupier, whereas we are here concerned with the value to the landlord. The law requires those who assess rateable value to have a lively imagination. They have to picture this country as a land which is inhabited by tenants, who are not real but hypothetical, and where the Rent Restriction Acts do not exist. The law does not require anything so far-fetched in the case of the Housing Acts. The local authority have to take every house as it is. If it is occupied by a tenant who is paying a rack-rent, then the person who in fact receives the rent is the person in control of the house. If it is occupied by the owner, then he is the person in control, because he is the person who would receive the rent if it was let at a rack-rent. If the house is one which is within the Rent Restriction

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[14] [1922] 2 A.C. 93.

Acts, regard must, I think, be had to that fact. The "full net "annual value of the house" is not to be calculated as if the Rent Acts did not exist. It is the full amount which a landlord can reasonably be expected to get from a tenant. He cannot reasonably be expected to get more than the Rent Restriction Acts permit. If he receives the full permitted amount he is receiving the full annual value. He is receiving a rack-rent and is the person having control of the house.

Any other view would lead to an impossible situation. If the Rent Restriction Acts are to be treated as non-existent, the annual value of the house would soar far above the restricted rent which the tenant is paying. The landlord would then not be the person having control of the house, because he would not be receiving a rack-rent. Who then would be in control of the house? Can it be said that the tenant would be the person having control? Is he the person who would receive the rack-rent if it was let at a rack-rent? That needs a great stretch of imagination, because the fact is that the tenant himself cannot sublet the house at more than the permitted amount; and if he is a statutory tenant, he cannot sublet it at all, that is, not as a whole.

Faced with these difficulties, Mr. Hoare suggested that there might be no one in control of the house and referred us to what Bowen L.J. said in *Wright* v. *Ingle*.[15] But if there was no person having control we would get to the absurd position that the Housing Acts would be inoperative in the case of houses which were within the Rent Restriction Acts, because there would be no one on whom the local authorities could serve the necessary notices. Parliament cannot have intended any such result when they passed the Housing Act, 1936. At that time there were still many small houses—class C houses—still within the Rent Restriction Acts, and it was very important that the landlords should keep them reasonably fit for human habitation. Parliament can never have intended to release the landlords from their responsibilities in respect of them.

The judge relied on the case of *Truman, Hanbury, Buxton & Co.* v. *Kerslake*,[16] but I think that case turned a good deal on its special facts. It should not be regarded as laying down a broad principle which has been subsequently sanctioned by Parliament: see *Royal Crown Derby Porcelain Co.* v. *Russell*.[17] If a landlord out of generosity or friendship chooses to let a house to an occupier at less than a rack-rent, I should have thought that the landlord would ordinarily be the person having the control of the house, because he is the person who would receive a rack-rent if it was let at a rack-rent. So here if, contrary to my opinion, the rent which is paid is not a rack-rent, then I think that the landlord is the person who would receive a rack-rent if the house was let at a rack-rent, because, if the restrictions imposed by the Rent Acts were removed, he is the person who would receive the full rent.

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[15] (1885) 16 Q.B.D. 379, 402.

[16] [1894] 2 Q.B. 774.

[17] [1949] 2 K.B. 417.

My conclusion is that the local authority can compel the landlord to do the necessary repairs. The landlord has theoretically a right over in damages against the tenant for not repairing, or a ground for claiming possession, because the tenant was under an obligation to do the repairs and has not done them. But that does not affect the right of the local authority to compel the landlord to do it. It is no doubt hard on private landlords that they should be compelled to do repairs at greatly increased cost and not be allowed to increase the rent; but that is a matter for Parliament and not for us. I agree that the appeal should be allowed.

ROMER L.J. I agree that this appeal should be allowed. Section 9 (4) of the Housing Act, 1936, provides that for the purposes there relevant "the person who receives the rack-rent "of a house . . . or who would so receive it if the house were let "at a rack-rent shall be deemed to be the person having control "of the house."

The term "rack-rent" was defined by Blackstone (2 Blackstone's Commentaries, p. 43), as "a rent of the full value of "the tenement, or near it." Swinfen Eady L.J. described it in *Gundry* v. *Dunham*[18] as "the value at which the "premises are worth to be let by the year in the open "market; what a tenant, taking one year with another, may "fairly and reasonably be expected and required to pay." The words "and required" are not without importance in relation to the present case. The definition of rack-rent in section 9 (4) does not disturb this long-accepted understanding of the term in attributing to it the meaning of "the full net annual "value of the house" but, for the purposes of the section, reduces such annual value by one-third. The fundamental characteristic, therefore, of the person who is rendered liable, in the first instance, to the charge imposed by the section, is that he should be in receipt of two-thirds of the rack-rent, according to what is (in effect) the ordinary acceptation of that term, of the premises to which the charge relates.

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[18] (1915) 7 Tax Cas. 12, 22.

The landlord contends in effect that this rack-rent is to be ascertained, so far as rent-controlled houses are concerned, by an estimate of what the houses would yield each year if the Rent Restriction Acts had never been passed; alternatively, he argues that the full annual value of controlled houses in the hands of the owners may exceed the standard rents of such houses if the standard rents have to be taken into account. Taking the second point first, it was illustrated in argument by the following example. A man who owns a rent-controlled house lets it for occupation at the standard rent to a servant who works for him. In such a case, it is said, the annual value of the house to the owner is greater than the amount represented by the standard rent for, by reason of the occupation, he gets the services in addition. So he does, but the services are not "rent," and it is by reference only to rent, as I have already pointed out, that, by the language of the section itself, the annual value of the house is to be assessed. I am accordingly unable to accept the argument of counsel for the landlord so far as this point is concerned.

The first point was mainly based on *Poplar Assessment Committee* v. *Roberts*.[19] I have had the advantage of reading the judgment which my Lord has delivered and I entirely agree with what he has said upon this aspect of the case. In the Court of Appeal Atkin L.J. considered the language of the statute which was there in question in the light of its assumed applicability to the relationship of landlord and tenant and, on that hypothesis, expressed his conclusions in a manner which militates strongly against the landlord's argument on the present appeal. The House of Lords in no way differed from or overruled Atkin L.J.'s reasoning, but said that the correct approach to the question of value for the purposes then under discussion was not (as here) what the property was worth to a landlord but what the right of occupation was worth to the occupier. I accordingly agree that the views of Atkin L.J. in the *Poplar* case[20] may be regarded as authority against the present respondent.

Then it was contended that the word "full" in the section is the opposite of "restricted" and that this shows that the legislature had in mind what the judge described as the economic rent rather than the controlled rent. As to this it is true that a burden is imposed by the section and that the word "full" (as indeed the term "rack-rent" itself) does suggest that the burden was only intended to be borne by a person who was in receipt of an economic or profit rental. But this consideration cannot in itself nullify the effect which the Rent Restriction Acts would otherwise have upon the position. When the legislation was first introduced into our economic and social system, and it may be for some considerable time thereafter, landlords still received a profit rental although they were in the main precluded from increasing it. The general trend of the legislation has long since resulted in landlords only receiving rentals which are usually a great deal less than those received by owners of equivalent but uncontrolled properties. Nevertheless this change cannot alter the fact that landlords who are affected by the legislation are undoubtedly receiving the full rent which their properties are capable of yielding, in the sense that they are receiving the maximum which is permitted by the law. In other words, they are receiving the "rack-rents" of their premises. The argument to the contrary overlooks the fact that value is not an absolute but a relative conception. The value of any particular thing can only be ascertained in the light of circumstances which affect or control its disposability. For example, the apparent owner of property might have some defect in his title which would lessen its selling value below that of another similar property the title to which was flawless. Similarly in the present case the rack-rent or annual value of the property in question is conditioned by the fact that its owner cannot increase its annual yield beyond the permitted maximum.

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[19] [1922] 2 A.C. 93.

[20] [1922] 1 K.B. 25, 53.

In my opinion the legislature, in section 9, was applying itself to a factual and not to a hypothetical position. If the standard rent is the greatest rent that is obtainable in respect of any particular premises then it is the full rent of those premises, the rack-rent, notwithstanding that (and indeed because) the owner is restricted from receiving the higher rent which the premises, if uncontrolled, would command.

On the second question, which was argued before us, no decision is necessary having regard to our views upon the first question, but I agree with the observations which my brethren have made upon it.

In agreeing with the order allowing the appeal I would like to associate myself with what my Lord has said as to the ability with which the arguments before us were presented by counsel on both sides.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.; for E. Taberner, Town Clerk, Croydon; A. du H. Rawlance.*

A. W. G.

THOMPSON *v.* MILK MARKETING BOARD.

C. A.
1952
June 10;
July 4.

Somervell, Birkett and Hodson L.JJ.

Rating—Cattle breeding centre—Artificial insemination of cows—Buildings, with agricultural land—Agricultural buildings—"Used "solely in connexion with agricultural operations" on the land—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 2.

A cattle breeding centre established by the Milk Marketing Board was used for the extraction of semen for the artificial insemination of cows. It consisted of buildings used for the housing of the bulls and the storage of food for them, and about 29 acres of arable and grass land, on which about a fourth of the food required for the animals was produced. The actual insemination was not carried out at the centre, but on the farms in the vicinity and was done by inseminators sent out from the establishment. The Lands Tribunal, having decided that the agricultural land was merely auxiliary to the buildings for the purpose of the activities of the centre, and that none of the buildings was "occupied "together with agricultural land and . . . used solely in connexion "with agricultural operations thereon," within the meaning of section 2 of the Rating and Valuation (Apportionment) Act, 1928, held that the hereditament was rateable and was properly to be included in the local valuation list. On appeal by the board:—

Held, that the land being substantial in extent, and being used together with the buildings for the purpose of a combined agricultural operation, the centre came within the definition in section 2 of the Rating and Valuation (Apportionment) Act, 1928, of an agricultural hereditament and therefore under section 67 (1) of the Local Government Act, 1929, was not rateable; and that the buildings did not cease to be agricultural buildings because what was done in them led up to service outside the centre.

APPEAL from the Lands Tribunal by way of case stated.

A cattle breeding centre at Ringfield Road, Beccles, was one of 26 centres established by the Milk Marketing Board in England

and Wales for the extraction of semen for the artificial insemination of dairy cows. The Beccles centre consisted of 21 acres of grassland and eight acres of arable land, together with buildings for the housing of the animals, storage, etc. On the land about one-fourth of the food required for the animals was produced. About 36 bulls and two " teaser " cows were kept and an average of about 360 collections of semen were taken per month. There were 4,029 farmer members of the centre and sub-centres who were entitled to services from the centre if their farms were within a radius of 15 miles. A charge was made for the insemination, which was carried out by inseminators. The Beccles centre was in charge of a veterinary surgeon, who had a staff of four clerks, three stockmen and nine inseminators. These last took semen from the store at the centre and travelled with it to the farms. The buildings occupied a superficial area of 10,704 square feet, of which far the larger part consisted of bull pens, service rooms for taking the semen, fodder and isolation boxes. The bulls were normally housed in the bull pen block, but some of them were, on occasions, tethered on the grass, which was also used for exercise.

On December 21, 1949, a proposal was made on behalf of the board for an amendment of the Lowestoft Rating Area's valuation list by the omission therefrom of the Beccles centre, on the ground that it was an agricultural hereditament and therefore to be deemed to have no rateable value. The proposal was opposed by the valuation officer for the area, but was approved by the local valuation court for the East and West Suffolk and Ipswich Area. An appeal by the valuation officer was allowed by the Lands Tribunal, who directed that the hereditament be restored to the valuation list, with an assessment of £120 gross and £97 rateable value.

The Lands Tribunal expressed its conclusions in the stated case as follows: " Although we found that all the said buildings " were occupied together with the said agricultural land, and " although we regarded all the operations carried out on the land, " that is to say the raising and harvesting of animal food crops " and the pasturing and exercising of the animals kept at the " centre, as being agricultural operations, we were of opinion that " none of the buildings satisfied the test of being used *solely* in " connexion with those operations. We felt that we ought not " to regard the Bull Pens Block, with accommodation for 32 bulls, " as used solely in connexion with agricultural operations on so " small an area of land as 29 acres; in this connexion we regarded "the land as merely auxiliary to the buildings for the purposes "of the activities of the centre. In our opinion it was a question "of degree and we had in mind that the land produced only 20 "to 25 per cent. of the food required for the animals housed. It "followed that we had to take a similar view of the ancillary "buildings. In reference to the office block and the laboratory "block we reached the conclusion that they also were not used "solely in connexion with agricultural operations on the said "land."

The Tribunal therefore decided that "none of the said buildings "was an agricultural building within the meaning of the Rating "and Valuation (Apportionment) Act, 1928,"[1] and ordered that the appeal be allowed.

The board appealed.

Rowe Q.C. and *L. A. Blundell* for the board. On the true construction of section 2 of the Rating and Valuation (Apportionment) Act, 1928, the buildings comprised in this hereditament are occupied together with agricultural land and are used solely in connexion with agricultural operations thereon. The breeding of dairy cattle is an agricultural operation. The centre exists for the purpose of extracting semen from bulls, in order that it may be sold to neighbouring farmers who desire their dairy cows to be inseminated. The Tribunal appears to attach importance to the limited extent of the land and the fact that it only produces about a quarter of the food required for the animals. That, it is submitted, is a wrong approach to the question at issue. All that section 2 requires is that there shall be some agricultural land and that the buildings shall be used together with that land solely in connexion with agricultural operations thereon. In *Lord Glanely* v. *Wightman*[2] the appellant was the owner of a stud farm and of a stallion, a former winner of the Derby, which was visited by, and served, the mares of other owners. It was held that the fees were profits in respect of the occupation of the farm. Could it be suggested that if the bulls were kept for receiving cows on the centre that an agricultural purpose was not being carried out? *Parry* v. *Anglesey Assessment Committee*[3] is distinguishable from the present case. In that case a shed on a farm was used to house a car which was used both for agricultural and private purposes. The private purpose being substantial the shed was held not to be an agricultural building. In the present case there is only one use and not two.

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[1] Rating and Valuation (Apportionment) Act, 1928, s. 2: "In this "Act the expression 'agricultural "'hereditament' means any here- "ditament being agricultural land "or agricultural buildings. 'Agri- "'cultural buildings' means build- "ings (other than dwelling-houses) "occupied together with agricultural "land or being or forming part of a "market garden, and in either case "used solely in connexion with agri- "cultural operations thereon."

[2] [1933] A.C. 618.

Sir A. Comyns Carr Q.C. and *M. Lyell* for the valuation officer. In order to determine whether these buildings are agricultural buildings within the meaning of section 2 of the Act of 1928 the court has to ascertain whether they are being used solely in connexion with an agricultural operation on the arable and pasture land. It is clear that they are not. The semen is not sold as a commodity, as is the ordinary produce of a farm. The insemination of the cows is a service, and it is a service off the land and not thereon. The buildings are used for a particular and special purpose, and the land is only quite incidentally convenient in connexion with that purpose. It may be an agricultural operation and purpose, but the buildings are not used for an agricultural operation on the land.

[*Malcolm* v. *Lockhart*[4] referred to.]

Cur. adv. vult.

July 4. The following judgments were read:

SOMERVELL L.J., having stated the facts and read the conclusions of the Lands Tribunal, continued:—In the first place I agree that the operations carried out on the 29 acres were agricultural operations. I also agree that the word "thereon" at the end of the definition in section 2 of the Act of 1928 means "on the agricultural land," which under the definition includes pasture. In considering the effect of the word "solely" it is necessary to bear in mind that the agricultural operation in buildings, though in connexion with, will frequently perhaps normally be an operation different from that on the land. Cows are put out to pasture on the land and milked in a building. No one, I think, would dispute that such a building was within the definition. The cows are pastured in order that milk may be obtained from them and distributed. It is a combined agricultural operation carried on in part on the land and in part in the building. So here the keeping, feeding and exercising of bulls for the collection and distribution of semen is the object of the centre, carried on

[3] [1949] 1 K.B. 246.

[4] [1919] A.C. 463.

in part on the land, in part in the building. The products of a farm, of the combined operations carried on on land and in buildings are normally disposed of in the market. Beasts are sent to be sold in markets or slaughtered for food, corn is sold to be milled or dairy products sold to dealers or members of the public.

Sir Arthur Comyns Carr, for the valuation officer, submitted that the semen was not sold as a commodity. The insemination of the cows was, he submitted, a service. I accept this, but I do not think it affords an answer to the problem. A building does not, in my opinion, cease to be an agricultural building because what is there done leads up to sales or services. In *Parry* v. *Anglesey Assessment Committee* [5] the application of the definition was considered in relation to a shed on a farm in which a car used both for agricultural and private purposes was stored. Quarter sessions had decided that the use for private purposes was substantial and could not be disregarded under the de minimis principle. The shed was therefore held not to be an agricultural building. This was upheld by the Divisional Court. The other purpose there was clearly not in connexion with any agricultural operations. Such purposes are clearly excluded by the word "solely."

Coming back to the conclusion of the Tribunal, it is clear that it is not based on the de minimis principle. The question is whether, apart from such principle, the definition poses the question, as the Tribunal have held, whether the operations in the building are auxiliary to those on the land or vice versa. There is no evidence in the award of the average amount of feeding stuffs purchased on, for example, dairy farms. It may well in the case of a particular farm vary from year to year. I will assume the average amount is very much below 75 per cent. Nevertheless such a test would lead to difficult border-line cases. The wording of the definition is not, I think, very easy to construe and I appreciate, if I may say so, the arguments for the construction adopted by the Tribunal, but I have come to the conclusion that it is wrong. Where, as here, the land is substantial and is used in the way stated as a part of the agricultural purpose to which both land and buildings are solely put, I think the words of the definition are satisfied. One does not have to consider which plays the major part.

We were referred to *Malcolm* v. *Lockhart* [6] and *Lord Glanely*

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[5] [1949] 1 K.B. 246.

[6] [1919] A.C. 463.

v. *Wightman*,[7] which dealt with the circumstances in which fees earned by stallions were or were not covered by the Sch. B assessment. On the view which I have formed as to the construction of the definition with which we are concerned they do not, I think, assist. I would allow the appeal.

BIRKETT L.J. The question for determination in this appeal is whether the buildings of the Milk Marketing Board at their centre in Beccles come within the provisions of section 2 of the Rating and Valuation (Apportionment) Act of 1928, so as to be treated as an agricultural hereditament. The local valuation court thought the buildings were an agricultural hereditament and should be excluded from the valuation list; the Lands Tribunal reversed this decision, and the board appeal to this court. I can quite understand this divergence of view, for the decision turns on points of some nicety on which different views can quite easily be taken. The material words of section 2 are: " Agricultural land " means arable, pasture or meadow land. " Agricultural buildings " means buildings occupied together with agricultural lands used solely in connexion with agricultural operations thereon.

The purpose of the centre at Beccles is to provide for the collection of semen from bulls in order to inseminate cows by artificial means. The larger purpose is to breed dairy cattle for the supply of milk. Over 4,000 farmers within a radius of 15 miles from the board's centre have become members and have thus qualified to have their cows inseminated artificially when they so desire. Inseminators are sent out from the centre to the farms for this purpose with the requisite semen collected and prepared at the centre. The buildings (for the purpose of this appeal) are the buildings at the centre in which the bulls are usually kept, and include pens, stores and rooms for the actual collection of the semen.

The land consists of 21 acres of grassland and eight acres of arable land. There is no question that this is agricultural land within the meaning of the section. The purpose of section 2 seems reasonably plain. A simple example would be the use of buildings for milking the cows that graze on the grassland of the farm, or buildings used to store the produce from the land. These would clearly be buildings occupied together with agricultural land used solely in connexion with agricultural operations thereon. In the facts of the present appeal the land is undoubtedly agricultural land, and the Tribunal has found that the buildings in question are occupied together with that agricultural land. The crucial question is: are the buildings occupied together with agricultural land used *solely* in connexion with agricultural operations thereon? It is clear that they are not used for any other purpose than the professed purpose of the centre, so the kind of question that arose in *Parry* v. *Anglesey Assessment Committee* [8] does not arise here. The ultimate question therefore would appear to be: is the professed purpose of the centre an agricultural purpose on the land?

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[7] [1933] A.C. 618.

If buildings where cows are milked, for example, are buildings used solely in connexion with agricultural operations on the land, it is difficult to see why buildings which are used for the purpose of collecting the semen from the bulls and for no other purpose are not to be treated similarly. The fact that the arable land does not produce all the food for the bulls, or that the grassland is used only for tethering the bulls or exercising them, cannot alter the fact that the buildings are used solely in connexion with agricultural operations on the land. The definition of "agricultural operations on the land" must be wide enough, I think, to include the work at the centre. It would be much too narrow a view to hold that the agricultural operations are to be confined to the growing of food and the use of the grassland and to exclude the work carried on in the buildings.

The work of the centre must be considered as a whole when answering the question whether the buildings are used solely in connexion with agricultural operations on the land. Nor do I think that, because the insemination of the cows takes place away from the centre, the buildings where the semen is collected are thereby taken outside the scope of section 2. The produce of a farm is commonly sold away from the farm itself, and the fact that the insemination of the cows takes place on neighbouring farms does not seem to me to be an objection to the centre qualifying for exclusion from the valuation list. For these reasons I think that the decision of the Lands Tribunal cannot be supported on the facts of this case, and that the appeal of the Milk Marketing Board should be allowed.

Hodson L.J. This is an appeal by the Milk Marketing Board from a decision of the Lands Tribunal, given on December 20, 1951, relating to the board's hereditament described as Cattle

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[8] [1949] 1 K.B. 246.

Breeding Centre, Ringsfield Road, Beccles. The Tribunal restored the hereditament to the valuation list for the Lowestoft area on the ground that none of the buildings in question were agricultural buildings within the meaning of section 2 of the Rating and Valuation (Apportionment) Act, 1928.

[His Lordship stated the facts and continued:] In order to determine whether the buildings or any of them are an "agricultural hereditament" reference must be made to section 2 of the Act of 1928. [His Lordship read the section.] There can be no doubt that the word "agricultural" used with buildings must be read in the light of the definition of agricultural land which includes pasture as well as arable land. [His Lordship read the conclusions of the Tribunal and continued:] In my judgment, the conclusion arrived at by the Tribunal is erroneous in point of law. The land is being used for agricultural purposes and is agricultural land; nor is its extent so insignificant that it can be excluded by the application of the de minimis rule. It is, in my judgment, immaterial that the percentage of food provided for the animals from the land is relatively low. The buildings are occupied together with the agricultural land and are being used in connexion with agricultural operations thereon, since the land is used for the growing of food for the animals.

The remaining question is: Are the buildings *solely* used in connexion with agricultural operations thereon? This question was, I think, wrongly answered by the Tribunal in the negative. The only case to which our attention was drawn in which the section was considered is a decision of the Divisional Court, *Parry* v. *Anglesey Assessment Committee.*[8] That was a case concerning a shed in which a farmer kept his car and the question was, the car being a private car and sometimes used for agricultural purposes and sometimes for private purposes, whether the shed was used solely in connexion with agricultural operations on the land. The Divisional Court affirmed the decision of quarter sessions, who had held that the private user of the car was not so slight as to bring into play the de minimis principle. Lord Goddard C.J. said[9]: "This case raises a very short point. The "farmer used his car for the purposes of his farm, and to take "his produce to market. He also used it for a variety of domestic "and social purposes. Therefore the car is not merely a farm "wagon or implement, but partly that and partly a private car. "Section 2 of the Act of 1928, which might enable this building

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[8] [1949] 1 K.B. 246.

[9] Ibid. 249.

"to escape from rates, defines agricultural buildings as 'buildings "'occupied together with agricultural land or being or forming "'part of a market garden and in either case used solely in "'connexion with agricultural operations thereon.' It seems to "me that quarter sessions have come to the conclusion that this "car which is housed in this building is both a private car and "a farm car. It is really for them to come to the conclusion "whether its user as a private car is so slight and so occasional "that the doctrine of de minimis might fairly be applied. That "is a question of fact for the justices to decide. It is a matter "of degree."

This case was not directly in point but it illustrates the effect of the word "solely" contained in the definition. The decision is based on the finding that the car was sometimes used in connexion with something quite distinct from the agricultural operations on the land, namely, the private purposes of the farmer, so that the shed in which the car was housed could not be said to be used solely in connexion with any agricultural operation.

Our attention has also been drawn to the speeches in the House of Lords in two cases in which Sch. B and D of the Income Tax Acts were considered: *Malcolm* v. *Lockhart* [10] and *Lord Glanely* v. *Wightman*.[11] These cases deal with the occupation of land and do not, I think, give much assistance, although the language of Lord Wright in the later case (at pp. 639 and 640) does, I think, lend some support to the view contended for by the appellant. In speaking of a stallion he said [12]: "I think "that the service of the stallion is appurtenant to the soil and a "profit of the occupation in every case, so that in this regard it "is immaterial whether the service is to the appellant's own "mares or whether it is sold to strangers; in the latter case the "service is sold from the land and as a product of the land, "just as much as bullocks, potatoes, fruit or eggs are sold from "the land. Without the appellant's stud farm or some other "such stud farm the stallions could not live or exercise their "generating functions. The value of these functions is inseparably connected with the occupation of land." Similarly the function of the bulls here can properly be said to be inseparably connected with the occupation of the land, and I see no difficulty in regarding the buildings where the bulls are housed as being

[10] [1919] A.C. 463.

[11] [1933] A.C. 618.

[12] Ibid. 640.

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used solely in connexion with the agricultural operation performed on the land.

They cannot be said to be used in connexion with anything else unless the functions of the centre can be regarded as something separate from the agricultural operations on the land. With all respect to the view taken by the Lands Tribunal, I do not think they can be so regarded, nor do I think that the question is one of degree. The fact that the semen is removed from the bulls on the premises and taken away for injection into the females on other premises does not to my mind indicate an activity on the part of the centre separate from the agricultural operation on the land. Farming operations are often not completed on the farm; the threshing of grain may take place elsewhere but the barn in which sheaves are stored does not cease to be an agricultural building. The milk parlour remains an agricultural building although the milk is taken away and sold.

The question whether the buildings are auxiliary to the land or the land to the buildings is in my opinion irrelevant (subject to the de minimis rule) since the section does not say that the buildings must be wholly dependent on the land or vice versa, but that they are to be used solely in connexion with the agricultural activities thereon in order to fall within the definition. In my judgment these buildings do fall within the definition of an agricultural hereditament contained in the section, and I would allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Ellis & Fairbairn; Solicitor of Inland Revenue.*

A. W. G.

C. C. A.
1952
May 12.
Lord Goddard C.J., Jones and Parker JJ.

REGINA *v.* WINDLE.

Criminal Law—Defence of insanity—McNaghten rules—Knowledge of accused that act committed was "wrong"—Meaning of "wrong"—McNaghten rules not confined to cases of delusion—No evidence of insanity—Right of judge to withdraw issue from jury.

Under the rules laid down in *McNaghten's Case* (1843) 10 Cl. & F. 200, "to establish a defence on the ground of insanity, it must "be clearly proved that, at the time of the committing of the act, "the party accused was labouring under such a defect of reason "from disease of the mind as not to know the nature and quality "of the act he was doing or, if he did know it, that he did not know "what he was doing was wrong."

"Wrong" in the rule means contrary to law, and not wrong according to the opinion which the person accused or other people might hold on the question whether the act might be morally justified. The McNaghten rules are not limited to cases in which the accused is suffering from delusions, but apply in all cases of insanity whatever may be the nature of the insanity or disease of the mind from which the accused is suffering.

Where, in the opinion of the judge at the trial, there is no evidence of insanity as defined by the rules, the issue of insanity may and should be withdrawn by him from the jury.

Appeal against conviction.

The appellant, Francis Wilfred Windle, was convicted before Devlin J. at Birmingham Assizes of the murder of his wife, and sentenced to death. He was a man, 40 years of age, of little resolution and weak character, and was married to a woman 18 years his senior. His married life was very unhappy; his wife was always speaking of committing suicide and the doctors who gave evidence at the trial were of opinion, from the history of the case, that she was certifiably insane. The appellant frequently discussed his home life with his workmates, until, as one of them said, they were sick and tired of hearing about it. Eventually a workmate said to the appellant, "Give her a dozen aspirins," and on the following day the appellant gave his wife 100 tablets. He sent for a doctor and told him that he had given his wife so many aspirins. She was taken to hospital, where she died. The appellant informed the police that he had given his wife 100 aspirins, and added: "I suppose they will hang me for this?" At his trial a defence of insanity was put forward. A doctor was called for him who said that the appellant was suffering from a form of communicated insanity known as folie à deux. It was said that if a person was in constant attendance on another of unsound mind, in some way the insanity might be communicated to the attendant, so that, for a time at any rate, the attendant might develop a defect of reason or of mind. Rebutting medical evidence was allowed to be called for the prosecution, and the doctors called on either side expressed the opinion that the appellant, when administering the fatal dose of aspirin to his wife, knew that he was doing an act which the law forbade.

Devlin J., having heard the evidence, ruled that there was no evidence of insanity, as defined in the rules in *McNaghten's* case,[1] to be left to the jury. He accordingly withdrew that issue from them, and they found the appellant guilty of murder.

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[1] (1843) 10 Cl. & F. 200.

C. N. Shawcross Q.C. and *A. C. H. de Piro* for the appellant. Devlin J. was wrong in withdrawing the case from the jury. The medical evidence called on behalf of the appellant established (1) that he was suffering from a well known form of insanity, namely, folie à deux communicated to him by his wife, as a result of which, according to medical evidence called by the Crown, the appellant was no longer a free agent, being completely under the will of his wife, a woman 18 years older than himself and of a dominating character; (2) that this disease of the mind so affected the appellant's reasoning at the time of committing the act, that he was incapable of forming a rational judgment between right and wrong; (3) that at that time he thought that what he was doing was right and, that in view of his wife's condition, it was something which should be done and which he ought to do; and (4) that he knew, nevertheless, that what he was doing was contrary to law. It is submitted that the evidence clearly indicated that the appellant was suffering from a disease of the mind and that being so the question of his insanity and his responsibility should have been left to the jury. He was entitled to have his plea of guilty but insane considered by the jury, who would have been entitled to disregard the medical evidence and to infer, from the appellant's whole conduct, that he was so suffering from a disease of the mind as to be insane and irresponsible, when judged by the McNaghten rules or any other standard.

At the trial the Crown put forward those rules as being a code which applied to every case without exception or deviation. The rules declared the law as it existed in 1843, and, apart from the clear caveat in the preamble, they were dealing with hypothetical cases of insanity in which the accused was alleged to be suffering from delusion, i.e., an imaginary belief that a state of facts exists which in reality has no existence. It is agreed that neither the appellant nor his wife had any such delusion. Under the rules the proper test is, not that the accused must know that what he is doing is legally wrong but that he must know that it is both legally and morally wrong. The rules have been discussed in many cases and they have never been extended or relaxed but, on the other hand, they have never been curtailed or contracted. The first question to be considered is whether they can be applied in every case whether there is delusional insanity or not.

[LORD GODDARD C.J. Is there any authority for saying that they only apply in cases where delusions exist? They have always been applied in every case in which lunacy is suggested without reference to the particular form of insanity.]

Although the rules have been applied in all cases, it does not follow that they have been altered or amended in meaning and it may well be that, properly interpreted, they do not apply to a case such as the present, namely, one of communicated insanity, in which no delusion existed. The whole basis of a plea of insanity is that the accused, by reason of the state of his mind, is incapable of forming a rational judgment and is, therefore, not responsible for his act: see *Regina* v. *Pate*,[2] *Regina* v. *Layton*[3] and *Regina* v. *Townley*.[4] From a number of recent cases it is reasonably clear that at the time the accused did the act, he knew that it was illegal, but in none of such cases was it ever suggested that the case should not have been left to the jury: see Kenny, Outlines of Criminal Law (1952), p. 71; *Rex* v. *Smith*.[5] Reliance was placed by the Crown on *Rex* v. *Cordere*,[6] but it is submitted that if ever there was a case in which it might have been held that there was no evidence that was it. It was there contended for the appellant that the jury ought to have found him guilty but insane, but the court held that although there was nothing to connect any insanity with the crime, it was proper to leave the case to the jury. *Rex* v. *Rivett*[7] is a strong authority for the propositions (1) that the test under the McNaghten rules is responsibility; and (2) that it is for the jury alone, if there is evidence that there is disease of the mind, to decide whether that disease makes the person charged responsible or not responsible. It is only when there is no evidence of disease of the mind in any way connected with the crime charged that the case can properly be withdrawn from the jury. There is no case in the reports in which the trial judge in a case of murder has refused to allow the plea of insanity to be left to the jury.

[LORD GODDARD C.J. I myself and one of my brethren have done so at least once at assizes.]

No doubt those were cases where there was either no evidence of disease of the mind at all or of anything which related the disease to the crime. In the present case Devlin J. interpreted the McNaghten rules as meaning that the test was whether the accused knew that what he was doing was legally wrong. If that were right, the sooner the rules are amended the better. But even if Devlin J.'s construction were right, the question is one entirely for the jury.

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[2] (1850) 8 St.Tr.N.S. 1.
[3] (1849) 4 Cox C.C. 149.
[4] (1863) 3 F. & F. 839.
[5] (1910) 6 Cr.App.R. 19.
[6] (1916) 12 Cr.App.R. 21.
[7] (1950) 34 Cr.App.R. 87.

In the present case, they might have disregarded the appellant's confessions, and the statement that he knew that what he had done was punishable, especially as they were, ex hypothesi, the statements of an insane person. They might also have rejected the medical evidence and have taken the view that on the admitted facts there was such a close connexion between the disease of the mind of the accused and the act committed that he was not responsible in law. If Devlin J. were right in construing the word "wrong" in the McNaghten rules as meaning merely wrong in law, it would introduce a dangerous doctrine, since it would allow a person whose sanity was suspected to put forward as a defence that by reason of his state of mind he did not know that what he was doing was illegal. But as the rules themselves state, all trials for such offences as homicide must proceed on the basis that the accused is conclusively presumed to know the law. The true test under the rules (assuming that they apply in cases where there is no delusion—which, it is submitted, is not the case) is: did the accused suffer from such a defect of reason as prevented him from distinguishing between right and wrong, though he may have known that what he was doing was contrary to the law?

A. J. Marshall Q.C. and *E. Daly Lewis* for the Crown were not called on to argue.

LORD GODDARD C.J. stated the facts and continued:—The case made for the appellant at the trial was that he was insane, and that a special verdict to that effect should be returned. Devlin J., having heard all the evidence, which for the defence consisted of the evidence of one doctor, ruled that there was no evidence of insanity to be left to the jury. There was some evidence that the appellant suffered from some defect of reason or, as it might be called, disease of the mind. The doctor who was called for him said that it was a form of communicated insanity known as folie à deux. In such cases, it is said that if a person is in constant attendance on someone of unsound mind, in some way or another the insanity is, or may be communicated to the attendant, so that, for a time at any rate, the attendant has a defect of reason or disease of the mind.

Devlin J., as I have said, declined to leave the case of insanity to the jury. No doubt that is a strong line to take. But it is not only a line that a judge may take; it is one that he ought to take if he is convinced that there is no evidence to be left to a jury on a particular issue.

The issue of insanity is generally raised only in murder cases. It is common knowledge that it is for the defence to prove insanity, and if no evidence is given of insanity as understood by the law, there is no issue on the question to be left to the jury any more than in the case of any other issue which may be raised in a case and which is unsupported by evidence. Of course, it generally happens that if in a criminal proceeding the case is withdrawn from the jury, it is because the prosecution have failed to prove the case. If that is the opinion of the judge, it is his duty to withdraw it. So too, where the law puts on the defendant the burden of proving an issue—and there are a number of cases besides the issue of insanity in which a statute puts the proof of certain facts on the defence—and the defence fails to give any evidence of those facts, it is right for the judge to tell the jury that the defence raised is not going to be left to them because there is no evidence to support it.

The point we have to decide in this case can be put into a very small compass. We are asked to review what are generally known as the McNaghten rules,[8] and possibly to make new law. The McNaghten rules were the rules which the judges agreed in 1843 were the proper tests to be applied in considering the defence of insanity. They were never laid down in a decision. What happened was that as the result of a controversy which had arisen with regard to the proper directions which should be given to the jury when insanity was pleaded, the House of Lords called on the judges, who are always in attendance to advise them on points of law if required, to express their opinion on what were the proper questions that should be left to the jury, and what was the proper way in which the issue of insanity should be left to them, when insanity was raised as a defence. Their Lordships unanimously approved the tests suggested, and all the judges with the exception of Maule J., who differed on small points, gave, through the mouth of Tindal C.J., this answer: "That "the jury ought to be told in all cases that every man is presumed "to be sane, and to possess a sufficient degree of reason to be "responsible for his crimes, until the contrary is proved to their "satisfaction; and that, to establish a defence on the ground of

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[8] 10 Cl. & F. 200.

"insanity it must be clearly proved that, at the time of the "committing of the act, the party accused was labouring under "such a defect of reason, from disease of the mind, as not to "know the nature and quality of the act he was doing, or, if he "did know it, that he did not know he was doing what was "wrong."

The argument before us has really been on what is the meaning of the word "wrong." In this particular case, the only evidence given on the issue of insanity was that of the doctor called by the appellant and of the prison doctor who was allowed to be called by the prosecution to rebut, if indeed it was necessary, any evidence which had been given. It was probably right that the prison doctor should be called as he had had the appellant under constant observation. Both the doctors gave their evidence in a way that commended itself to the judge, and both, without hesitation, expressed the view that the appellant knew, when administering this poison, for such it was, to his wife, that he was doing an act which the law forbade. I need not put it higher than that.

It may well be that, in the misery in which he had been living, with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought that she would be better out of this world than in it. He may have thought that it would be a kindly act to release her from what she was suffering from—or thought she was suffering from—but that the law does not permit. In the present case there was some exceedingly vague evidence that the appellant was suffering from a defect of reason. In the opinion of his own doctor, there was a defect of reason which he attributed to communicated insanity. In my opinion, if the only question in this case had been whether the appellant was suffering from a disease of the mind, I should say that that was a question which must have been left to the jury. That, however, is not the question.

As I endeavoured to point out in giving the judgment of the court in *Rex* v. *Rivett*,[9] in all cases of this kind, the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is "wrong," and by "wrong" is meant contrary to law, he is responsible. Mr. Shawcross, in the course of his very careful argument, suggested that the word "wrong," as it was used in the McNaghten rules, did not mean contrary to law but had some kind of qualified meaning, such as morally wrong, and that if a person was in such a state of mind through a defect of reason that, although he knew that what he was doing was wrong in law, he thought that it was beneficial or kind or praiseworthy, that would excuse him.

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[9] 34 Cr.App.R. 87.

Courts of law can only distinguish between that which is in accordance with law and that which is contrary to law. There are many acts which, to use an expression which is to be found in some of the old cases, are contrary to the law of God and man. For instance, in the Decalogue will be found the laws "Thou "shalt not kill" and "Thou shalt not steal." Those acts are contrary to the law of man and also to the law of God. If the seventh commandment is taken, "Thou shalt not commit "adultery," although that is contrary to the law of God, so far as the criminal law is concerned it is not contrary to the law of man. That does not mean that the law encourages adultery; I only say that it is not a criminal offence. The law cannot embark on the question, and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law. In *Rex* v. *Rivett* [10] I tried to make that clear. I cited the exception in the Trial of Lunatics Act, 1883, for it is not always borne in mind that it is that Act which is the governing Act in cases of this kind, because it provides for a special verdict to be given when a plea of insanity is set up and succeeds. Section 2 (1) of the Act of 1883 provides: "Where in any indictment or "information any act or omission is charged against any person "as an offence, and it is given in evidence on the trial of such "person for such offence that he was insane, so as not to be "responsible, according to law, for his actions at the time when "the act was done or omission made, then, if it appears to the "jury before whom such person is tried, that he did the act or "made the omission charged, but was insane as aforesaid at the "time when he did or made the same, the jury shall return a "special verdict. . . ."

I desire to emphasize again, as we sought to emphasize in *Rex* v. *Rivett*,[10] that the test is "responsibility according to law." Counsel for the appellant argued that the McNaghten rules only applied to cases in which delusions were present. The court cannot agree with that. It is true that when the judges who formulated the rules were summoned by the House of Lords the occasion had special reference to McNaghten's case, but ever since that date the rules have been generally applied in all cases of insanity, whatever the nature of the insanity or disease of the mind from which the person accused is suffering.

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[10] 34 Cr.App.R. 87.

In the opinion of the court there is no doubt that in the McNaghten rules "wrong" means contrary to law and not "wrong" according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified. In the present case, it could not be challenged that the appellant knew that what he was doing was contrary to law, and that he realized what punishment the law provided for murder. That was the opinion of both the doctors who gave evidence.

In these circumstances what evidence was there to leave to the jury which could suggest that the appellant was entitled to a verdict of guilty but insane—that is, that he was guilty of the act, but that when he committed it he was insane so as not to be responsible according to law? If there was no such evidence, the judge was entitled to withdraw the case from the jury and was, I think, right in doing so.

For these reasons, although the case is one that will, no doubt, receive attention elsewhere, which is not a matter for this court, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Alec H. Evans; Director of Public Prosecutions.*

P. B. D.

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[1951 L. No. 17.]

Agricultural holding—Notice to quit—Continuous occupation by a landlord for 12 *months—Succession of new landlord during period——Meaning of landlord—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1), (3), *s.* 94.

By section 24 of the Agricultural Holdings Act, 1948: "(1) "Where notice to quit an agricultural holding . . . is given to the "tenant thereof, and . . . the tenant serves on the landlord a "counter notice . . . requiring that this subsection shall apply . . . "then, . . . the notice to quit shall not have effect unless the

"Minister consents to the operation thereof. (3) Nothing in this "section shall apply to a notice to terminate a tenancy of an "agricultural holding subsisting under a written contract entered "into before March 25, 1947 (*a*) where, immediately before the "creation of the tenancy, the holding had been for a period of not "less than twelve months in the occupation of the landlord. . . ."

The plaintiff and her husband lived on and worked an agricultural holding belonging to the husband. On her husband's death the plaintiff succeeded to the holding, which she continued to occupy and work, but after eight months she let the holding to the defendant on a yearly tenancy. Four years later the plaintiff desired to return to the holding and she served on the defendant a notice to quit pursuant to section 24 (3) of the Agricultural Holdings Act, 1948. The defendant served a counter-notice requiring section 24 (1) of the Act to apply, maintaining that section 24 (3) had no application because the landlord had not for a period of not less than 12 months immediately before the creation of the tenancy, been in occupation of the holding. The plaintiff did not seek the consent of the Minister. In an action for a declaration that the notice to quit was a valid, effective and operative notice to quit in which the plaintiff contended that by virtue of section 24 (3) of the Act the consent of the Minister to the operation of the notice under section 24 (1) was not required:—

Held, that on the true construction of section 24 of the Agricultural Holdings Act, 1948, the word "landlord" in section 24 (3) (*a*) meant a particular landlord who had granted the lease and who was the actual person who had been in occupation of the holding for a continuous period of not less than 12 months immediately prior to the creation of the tenancy; that in the present case although there had been a continuous occupation by a landlord for that period the plaintiff had been the landlord in occupation of the holding for seven or eight months only prior to the creation of the tenancy and did not fulfil the requirements of section 24 3 (*a*) and that, therefore, the notice to quit was one to which section 24 (1) applied, and the consent of the Minister to its operation was required. That consent not having been obtained the notice was, accordingly, bad.

ACTION.

The plaintiff was the landlord of an agricultural holding of which the defendant was tenant. Before 1946 the plaintiff and her husband occupied and worked the holding which was then the property of the plaintiff's husband. On February 7, 1946, the plaintiff's husband died and the plaintiff as sole executrix and beneficiary under his will succeeded to the holding, which she continued to occupy and work. By a memorandum of agreement dated September 21, 1946, the plaintiff agreed to let the holding to the defendant from October 11, 1946, on a yearly tenancy at an annual rent of £650 "until twelve months' notice to quit in writing "is given by either party to the other of them upon the express "terms that if the landlord desires to resume occupation before "the expiration of seven years from October 11, 1946, the landlord shall be entitled to give notice to quit without becoming "liable to pay the tenant any compensation for disturbance in "accordance with section 12 (7) (*g*) of the Agricultural Holdings "Act."

On October 11, 1946, the plaintiff left the holding and the defendant entered into occupation. In 1950 the plaintiff, who had been living at another farm, desired to return to the holding, and on October 10, 1950, through her solicitor, served a notice to quit on the defendant requiring the defendant to deliver up possession of the holding on October 11, 1951. The notice stated that it was given on and for the following grounds and reasons: "(1) The holding was let upon the express terms that if the "landlord desired to resume occupation before the expiration of "seven years from October 11, 1946, the landlord should be "entitled to give notice to quit without becoming liable to pay to "the tenant any compensation for the disturbance in accordance "with section 12 (7) (*g*) of the Agricultural Holdings Act, 1923; "and (2) The notice is given pursuant to section 24 (3) of the "Agricultural Holdings Act, 1948, so as to enable the landlord to "resume occupation of the holding within the specified period."

On October 28, 1950, the defendant served a counter-notice on the plaintiff requiring section 24 (1) of the Agricultural Holdings Act, 1948, to apply to the notice to quit and maintaining that section 24 (3) had no application to the holding "for the reason "that the landlord had not for a period of not less than twelve "months immediately before the creation of the . . . tenancy been "in occupation of the . . . holding." The consent of the Minister of Agriculture and Fisheries to the operation of the notice to quit was not given, nor was it sought by the plaintiff, who contended that, by section 24 (3) of the Act, the provisions of section 24 (1) did not apply to the notice to quit, and claimed a declaration that the notice was a valid, effective and operative notice to quit and that the defendant was bound to quit and yield up possession of the holding on October 11, 1951. The defendant contended that section 24 (1) of the Act applied to the notice and counterclaimed a declaration that there was no valid, effective or operative notice requiring him to quit the holding, and that he was entitled to remain in occupation in accordance with the terms of the memorandum and agreement of September 21, 1946.

J. T. Molony for the plaintiff.

H. Heathcote-Williams Q.C. and *Joseph Dean* for the defendant.

The argument sufficiently appears from the judgment.

Cur. adv. vult.

February 28. GORMAN J. stated the facts substantially as set out above and continued:—I have not been asked in this action to determine any matters other than whether the plaintiff is entitled to the declaration sought that the notice to quit is a valid, effective and operative notice to quit, and that the defendant is bound to quit and yield up possession of the holding in accordance with that notice.

First, however, it is necessary to consider the various relevant statutory provisions. The memorandum of agreement referred to section 12 (7) (*g*) of the Agricultural Holdings Act. Although no date was given, it was, in fact, the Agricultural Holdings Act, 1923, the Act in force at the time, which was referred to. Section 12 (7) of that Act is in these terms: "Compensation shall "not be payable under this section . . . (*g*) where a written "contract of tenancy has been entered into (whether before or "after the commencement of this Act) for the letting by the "landlord to the tenant of a holding, which at the time of the "creation of the tenancy had then been for a period of not less "than twelve months in the occupation of the landlord, upon "the express terms that if the landlord desires to resume that "occupation before the expiration of a specified term not exceeding seven years the landlord should be entitled to give notice "to quit without becoming liable to pay to the tenant any compensation for disturbance, and the landlord desires to resume "occupation within the specified period, and such notice to quit "has been given accordingly." By section 57 of the same Act it is provided: "In this Act, unless the context otherwise requires ". . . 'landlord' means any person for the time being entitled "to receive the rents and profits of any land."

That Act, therefore, gave a protection to the landlord in the matter of payment of compensation for disturbance but not in respect of a notice to quit. Section 30 of the Agriculture Act, 1947, dealt with compensation for disturbance, replacing most of the provisions of sections 12 to 14 of the Act of 1923. Section 30 (8) excluded the landlord's liability to pay compensation for disturbance where, before March 25, 1947, he entered into an

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agreement with the tenant that he should have the right to resume possession of the holding within a specified period not exceeding seven years, provided that the landlord had been in occupation of the holding for a period of not less than twelve months immediately before the creation of the tenancy, and the notice to determine the tenancy was given so as to enable him to resume occupation of the holding within the specified period.

Section 31 of the Act of 1947, which had no counterpart in the Agricultural Holdings Act, 1923, gave to the tenant a protection additional to the protection provided by the previous section of the Act. The short effect of it was that if the notice were given and if a counter-notice were served, the consent of the Minister was necessary to the operation of the notice. Section 31 (10) of the Act, however, provided that "nothing in this section "shall apply to any such notice as is specified in subsection (8)" of section 30; that is the section which I have just read. The importance of that is that in the cases where liability for compensation was excluded by section 30 (8) the protection given to the tenant by section 31 was also excluded and the requirement of the consent of the Minister under section 31 did not apply.

That was the position under the Act of 1947. The next Act, the Agricultural Holdings Act, 1948, was the Act in force at the time of the giving of the notice to quit, and is in force at the present time. By it, sections 30 and 31 of the Act of 1947 were repealed, and section 24 replaced the sections of the Act of 1947 relevant to the question under consideration. The marginal note to section 24 of the Act of 1948 is "Restrictions on operation of "notices to quit," and subsection (1) provides: "Where notice "to quit an agricultural holding or part of an agricultural holding "is given to the tenant thereof, and not later than one month "from the giving of the notice to quit the tenant serves on the "landlord a counter-notice in writing requiring that this sub-"section shall apply to the notice to quit . . ." Stopping there for a moment, the physical facts required up to there have been complied with in this case: there was a notice to quit given and there was a counter-notice in writing requiring that section 24 (1) of the Act should apply. The subsection continues: "then, "subject to the provisions of the next following subsection, the "notice to quit shall not have effect unless the Minister consents "to the operation thereof." There was no consent of the Minister given or sought in this case. I am not concerned with subsection (2), which covers cases where "the foregoing," that is subsection (1), shall not apply, but subsection (3) is the important provision here; it provides that: "Nothing in this section"—that is the obligation to obtain the consent of the Minister to the operation of the notice to quit—"shall apply to a notice to "terminate a tenancy of an agricultural holding subsisting under "a written contract entered into before March 25, 1947." That takes away, in the circumstances stated later in the subsection, the protection given to the tenant by subsection (1). Subsection (3) continues: "(*a*) where, immediately before the creation "of the tenancy, the holding had been for a period of not less "than twelve months in the occupation of the landlord; (*b*) the "holding is let upon the express terms that, if the landlord desires "to resume that occupation before the expiration of a specified "period not exceeding seven years, the landlord shall be entitled "to give notice to quit without becoming liable to pay to the "tenant any compensation for disturbance; and (*c*) the notice to "terminate the tenancy is given so as to enable the landlord to "resume occupation of the holding within the specified period."

It is clear, therefore, that subsection (3) is by way of exception to subsection (1) because, if its provisions are complied with, the tenant's protection against a notice to quit is lessened because the necessity for the consent of the Minister, as required by subsection (1), is removed. Section 94 of the same Act, which is the interpretation section, is important in this connexion; by it, as in the Act of 1923: "'Landlord' means any person for the "time being entitled to receive the rents and profits of any land." But that definition (and this is of crucial importance as I see the position here) has to be read with the opening words of section 94 (1): "In this Act, unless the context otherwise "requires, the following expressions have the meanings hereby "respectively assigned to them, that is to say . . ."

That is the history of the legislation and the statutory provisions, the effect of which I have to consider on the facts of this case. I also have in mind the proviso to section 34 (1) of the Act of 1948, but it is not necessary to read it. I have been very much helped by Mr. Molony for the plaintiff and by Mr. Heathcote-Williams for the defendant, and I propose to consider shortly the contentions which have been made to me. If I can put the contention for the plaintiff in a sentence, it is that under the existing law the case comes under section 24 (3) of the Act of 1948; there is no need to obtain the consent of the Minister.

The main argument turned on the interpretation of section 24 (3) (*a*): "where, immediately before the creation of the tenancy, "the holding had been for a period of not less than twelve months "in the occupation of the landlord." Mr. Molony's contention was that, interpreting that section properly, the holding had been for a period of not less than twelve months in the occupation of the landlord and, that being so, the consent of the Minister was not required to the operation of the notice. This is where the dates become important: the succession of the plaintiff was in February, 1946, the agreement was in September, 1946, but for some years before the succession of the plaintiff to this property her husband had been the landlord of it. There is no doubt that she was the landlord for some seven or eight months immediately before the creation of the tenancy in question, but it is equally clear that for about four months of the period of twelve months immediately before the creation of the tenancy her husband was the landlord of this holding. Mr. Molony, however, said that section 24 (3) (*a*) of the Act was complied with because, during the twelve months before the creation of the tenancy, the plaintiff and/or her husband were landlords, and, for that period, there was a continuous occupation by a landlord; that, although there was a break in the identity of the landlord, there was no time during those twelve months when a tenant was in occupation. He said that, although the personality of the landlord had changed, this fact did not affect the position. The matter was put in this way; that the test under the Act was: "was there a landlord in "occupation?" If, in fact, there was a landlord in occupation, then, by virtue of the definition of landlord in section 94, it did not matter if his personality was not always the same. Mr. Molony contended that whatever caused the change of the personality of the landlord was immaterial so long as the person in occupation was a landlord.

It will be appreciated that if that contention is right then no matter how often the ownership of the holding changes in the course of the twelve months before the creation of the tenancy each landlord is in occupation, each landlord gets the protection of the Act, and the tenancy can be determined without the consent of the Minister. If the test is whether a landlord was in occupation, for no matter how long, then it would follow that, so long as there was a continuous occupation of a holding by some landlord during the requisite twelve months, a landlord could sell that holding, with the benefits accruing from the ability to determine the tenancy without the necessity for the consent of the Minister.

In this case the plaintiff came into possession of the holding, not as a result of sale, but as the beneficiary under her husband's will; Mr. Molony says that that does not affect the general position, because whatever caused the change of landlord is immaterial so long as there was a continuous occupation during that twelve months of a landlord. In support of this contention my attention was called to section 92 (5) and section 25 (1) (*d*) of the Act, and it was said that: "The landlord is a legal con- "ception who may be a different person at different times." But it was conceded that it all depends on whether the case comes within section 24 (3). No matter who created the tenancy, Mr. Molony said, it was obvious that the person entitled to give the notice was the person who was the landlord at the time of the giving of the notice because it would be quite useless to insist upon a landlord who was dead, but who happened to be alive at the time of the creation of the tenancy, giving a notice, and it was clear that the word "landlord" in section 24 (1) meant the person entitled for the time being to receive the rents and profits of the land. With regard to section 24 (3) (*c*), Mr. Molony said that it merely required the notice to be given within a certain time, and the word "landlord" must have the same meaning in paragraphs (*a*), (*b*) and (*c*) of that subsection. It was argued that there was nothing in the text or context which required the word "landlord" to have different meanings in different sections of the Act. I think that fairly summarizes the contentions of the plaintiff on the operation of section 24 (3) of the Act. Of course, it must be borne in mind, and it seems to me quite clear, that section 24 (3) is an exception to section 24 (1).

Mr. Heathcote-Williams, basing his argument on section 24 (3) (*a*), contended on behalf of the defendant that the notice was bad because the plaintiff in this action was not in occupation of this holding for a period of not less than twelve months before the creation of the tenancy. In substance he said that the periods of occupancy of different landlords could not be added together, even though there were a continuous occupation by some landlord, in order to say that the total period of their occupation was the requisite period of twelve months. He called my attention to the opening words of section 94: ". . . unless the context other- "wise requires. . . ." His argument was that the context here, and in particular the words "immediately before the creation of "the tenancy," limited the meaning of "landlord" in the definition and required the person, whose occupancy for twelve months was to be considered, to be the actual person creating the tenancy, and that the subsection was not of general application to all landlords in occupation during the vital twelve months. Subsection (3) was an exception to section 24 (1) of the Act conferring special privileges upon a special landlord. It required a continuous occupation by the person creating the tenancy. He said that really what was envisaged here was that, if for some reason a landlord in occupation had to give up his occupation, and desired to come back into occupation within the period not exceeding seven years, he could do so without being put to the disability, to use his expression, of getting the consent of the Minister.

It is not without importance and interest to look at section 24 (3) (*b*): "the holding is let upon the express terms that, if the landlord desires to resume that occupation before the expiration "of a specified period . . . the landlord shall be entitled . . . "give notice to quit." What is the meaning of "that occupation" except the occupation in which he was before the creation of the tenancy agreement? Can it be said that a man can resume something which he had not before? If the contention of the plaintiff is right, that so long as a landlord is in occupation during the twelve months, it matters not how many, then which of those numerous landlords is the person who can resume occupation? If one has a sale of the land during that period, and each of the persons becoming landlord is in occupation, who is it who can demand to go back? Is it the first, second, third, or the one who was in occupation "immediately before the creation of the "tenancy?" That is a matter which has been urged upon me and to which I have to give consideration. To summarize the contention of the defendant, it was that the landlord was the person—the person, not a legal conception—who had enjoyed occupation for a continuous period of twelve months immediately before the creation of the tenancy, and if that person wanted to resume his occupation, the legislature gave him the right to do so without obtaining the consent of the Minister.

Mr. Heathcote-Williams dealt also with the point raised by Mr. Molony in respect of section 92 (5) and section 25 (1) (*d*). He said that looking at section 24 of the Act there was no possible ambiguity as there might well be in the other two sections, that the scheme of the Act here was to prevent eviction, and section 24 (3) was by way of an exception to the landlord's general obligation, under section 24 (1), to obtain the consent of the Minister to the operation of the notice to quit, before it could be deemed to be a good notice. Those are the main contentions put forward on behalf of the parties.

I have anxiously considered the position here in the light of the submissions made. Section 24 (3) is, in my view, clearly an exception to section 24 (1) of the same Act. It may well be that in section 24 (1) of the Act it is contemplated that the landlord may be the person for the time being entitled to receive the rents and profits of the land; but if the plaintiff's contention be right here, any person being a landlord in occupation during one year is protected. It puts a landlord in the same position whatever be the grounds upon which he has become the landlord; he may be an executor, a mortgagee in possession, or a purchaser with a saleable right, for it was not contended here that the mere act of devolution by which a person became the landlord affected the position. I have considered also the possible effects on section 24 (3) (*b*) of the contention of the plaintiff that the position in section 24 (3) (*a*) is made right if there be a landlord irrespective of the person in occupation.

Looking at the whole position here and interpreting that subsection as, in my view, it is right that it should be interpreted, I am quite clearly of the opinion that the defendant's contention is right, and that the obligation under section 24 (3) (*a*) that the landlord shall have been in occupation for a period of not less than twelve months has not been complied with by the plaintiff. I think that Mr. Heathcote-Williams's contentions are right. The plaintiff in this action was not in occupation of this holding during the period of twelve months before the creation of the tenancy. I have considered the words of the subsection, and it is my view that the context connotes a particular landlord who granted the lease and who was in occupation for not less than twelve months immediately before the creation of the tenancy. The plaintiff does not fulfil the requirements of section 24 (3) (*a*); the notice was not a valid notice, and the plaintiff's claim for a declaration that such notice was a valid notice fails.

The defendant is entitled to a declaration in the form in which he claims it.

Declaration accordingly.

[An appeal was entered against this judgment but was subsequently withdrawn.]

Solicitors: *Lake & Son, for Roach, Pittis & Co., Newport, Isle of Wight; Holloway, Blount & Duke.*

J. F. L.

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Apr. 29, 30.

Singleton, Denning and Hodson L.JJ.

RELIANCE CAR FACILITIES LD. *v.* RODING MOTORS.

[1950 R. 524.]

Contract—Hire-purchase agreement—Recourse agreement with third party taking effect on termination of hiring agreement—Breach of hiring agreement—Notification to hirer that declaration of agreement terminated necessary before recourse agreement became effective.

A finance company financed the sale of a motor-vehicle by a hire-purchase agreement, supported by a recourse agreement with the vendors, a firm of motor-car dealers. By the recourse agreement "in the event of the termination of the hiring agreement" the dealers agreed to repossess the van and repurchase it from the finance company at the amount outstanding under the hire-purchase agreement. The hire-purchase agreement provided that if the hirer "made default in any . . . payment . . . the owner shall "have the right . . . to declare the hiring terminated and to "retake possession." The hirer defaulted and the finance company wrote to the dealers requiring them to repossess the vehicle from the hirers, and to pay for it in accordance with the recourse agreement. The dealers did not repossess the vehicle and refused to pay for it. On an action by the finance company against the dealers for the balance due under the hiring agreement:—

Held, that, on the terms of the hire-purchase agreement, to terminate it, there had to be a declaration by the finance company communicated to the hirers, or, alternatively, an unequivocal act amounting to such a declaration to the hirers. The letter to the dealers, not having been brought to the notice of the hirers, did not amount to a declaration that the hiring agreement had been terminated, and, therefore, the hiring never having been terminated, the recourse agreement had never become effective, and the dealers were not liable.

North Central Wagon and Finance Co. Ld. v. *Graham* [1950] 2 K.B. 7 distinguished.

Decision of Sellers J. reversed.

APPEAL from Sellers J.

The plaintiffs, Reliance Car Facilities Ld. (hereinafter called the finance company) financed the sale of a Dodge utility van to a firm called Riddelle & Housden (the hirers) by purchasing the van themselves and making a hire-purchase agreement with the hirers. That agreement was dated October 15, 1948. In addition, the vendors of the van, a firm of motor-car dealers named Roding Motors, entered into a "recourse agreement" with the finance company on October 16, 1948, whereby the dealers agreed that if the hirers defaulted under the hire-purchase agreement, they would repossess the van and would repurchase it from the finance company at the balance then due from the hirers under the hire-purchase agreement. The recourse agreement only took effect "in the event of the termination of "the hiring agreement" and it was provided by clause 3 of the hiring agreement that "should the hirer make default in any "monthly payment as agreed or commit any other breach of this "agreement . . . the owner shall have the right at any time to "declare the hiring terminated and to retake possession of the "said motor-vehicle."

The hirers defaulted under the hire-purchase agreement, after paying only the first instalment in November, 1948. Six months later, the finance company wrote asking for a cheque for the outstanding instalments and said: "Unless this matter is "attended to without delay we shall have no alternative than "to put into effect paragraph 3 of the hire-purchase agreement." The hirers sent a cheque for £100 but it was dishonoured, so the finance company wrote to the hirers again and said: "We must "ask you to call and see us in respect of your hire-purchase "account without further delay." Apparently the hirers did not call. The finance company wrote to the dealers, on July 28, 1949, and informed them that the hirers had failed to meet their obligations, adding "as we hold a 100 per cent. dealer "recourse on this vehicle we must request you to repossess this "as our agents. On the expiration of 14 days from this date we "shall forward you an invoice for the balance due." A copy of this letter was not sent to the hirers.

The dealers did not repossess the vehicle but complained to the finance company that they had been dilatory in pressing the hirers for payment. The finance company took no notice of the complaint, but sent an invoice to the dealers for the amount outstanding and demanded it as the price of the vehicle, as though it had been sold to them. Ultimately the finance company brought an action claiming payment for the van. Sellers J. held that the hiring agreement had been terminated and the dealers were accordingly liable under the terms of the recourse agreement to pay for the van the amount outstanding on the hire-purchase agreement.

The dealers appealed.

Hallis for the appellants, Roding Motors. The termination of the hiring agreement was a condition precedent to the recourse agreement becoming effective. The terms of the hiring agreement were that the determination was to be "declared." That meant an actual declaration or unequivocal act showing an intention to determine the agreement. The letter sent by the finance company to Roding Motors had not been communicated to the hirers and could not be such a declaration. *North Central Wagon and Finance Co. Ld.* v. *Graham* [1] is distinguishable from this case, for there the point at issue was whether the contract was terminable at will because of a fundamental breach, not whether it had been terminated. Here the hire-purchase agreement was not void by reason of the non-payment of instalments but merely voidable, and nothing had been done to terminate it. It is submitted that the letter of July 28 in fact treats the agreement as still subsisting. In *North Central Wagon and Finance Co. Ld.* v. *Graham* [1] the hire-purchase agreement was worded differently from this agreement. Here the words were not "may "terminate the hiring" as in that case, but may "declare the "hiring terminated." An actual declaration was needed and it had to be communicated to the hirers or, alternatively, there had to be some unequivocal act equivalent to a declaration. If the finance company had repossessed the vehicle that might have been sufficient, but it is not sufficient to require the dealer to do it under the recourse agreement, because the termination of the hire-purchase agreement must precede the coming into force of the recourse agreement.

Secondly, it was an implied term of the recourse agreement that in the event of a substantial default being made by the hirers, the finance company would exercise their right to terminate the agreement and would themselves retake possession of the car. The finance company must show that they had done this and could not rely on the defendants doing it. Finally, it is denied that the car was ever sold to Roding Motors and, accordingly, they cannot claim the price of it. At most the plaintiffs could only claim damages for breach of contract by the defendants refusing to accept the car and to carry out their executory contract.

W. M. F. Hudson for the finance company. The principle in *North Central Wagon and Finance Co. Ld.* v. *Graham* [1] is applicable here. It is not disputed that there has been a breach of the hire-purchase agreement and that there is, consequently, a right to terminate the agreement and I submit further that the agreement was in fact terminated by the finance company. If the hirers defaulted under the agreement, the finance company could terminate the agreement by doing any act which indicated that the contract between them was at an end. The letter of July 28 was such an act of termination and it was not essential to communicate with the hirers and notify them that the contract was at an end. Otherwise, if a hirer defaulted and disappeared, the finance company could never recoup themselves under the recourse agreement with the dealer unless they discovered the hirer's whereabouts and notified him. The finance company would, of course, have to do some act which was clearly directed to be termination of the contract. The declaration required by clause 3 of the hire-purchase agreement included such an unequivocal act. There is nothing in this contract which requires the finance company to give notice to the hirers of termination; and it would have been simple to have provided that notice was needed, if that were the intention. It would be straining the words of the contract to say that, on their true construction, written notice must be given to the hirers. The letter of July 28 was a declaration that the contract was at an end, and, as in *North Central Wagon and Finance Co. Ld.* v. *Graham*,[2] the contract was terminated and the dealers were told to repossess the car. They could not have done that until it was terminated, as their right to repossess the car only arose after termination of the agreement. This particular contract is worded slightly differently from that which was considered in *North Central Wagon and Finance Co. Ld.* v. *Graham*,[3] but Sellers J. did not find that altered the effect, and there is no real difference between them. It was not thought right to read into the wording in that case the necessity to give notice, and I submit it would be wrong to do so here.

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[1] [1950] 2 K.B. 7.

[HODSON L.J. In that case the hirer had in fact terminated the agreement himself by selling the car, so no notice could be necessary in those circumstances.]

I submit that the sale did not automatically terminate the agreement. It was terminable at the option of the owner; therefore the issue in that case, as in this, was whether the hirer had terminated the agreement, and whether it was necessary on the terms of the contract to give notice to the hirer so to do. The court held it was not necessary, and Sellers J. was right in following that case. [Counsel referred to the judgment of Asquith L.J.]

[HODSON L.J. That finding should be read against the judgment as a whole. It is clear that Asquith L.J. meant there that no notice was needed to give a right to terminate the contract, but not that it had been terminated.]

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[2] [1950] 2 K.B. 7, 15.

[3] [1950] 2 K.B. 7.

[SINGLETON L.J. I have asked DENNING L.J. to deliver the first judgment.]

DENNING L.J. referred to the two agreements made by the finance company, the one with the hirers and the other with the vendors of the van, and continued:—By the recourse agreement, it was provided that "in the event of the termination of the "hiring agreement" the dealers were to repossess the vehicle and purchase it back at the balance due under the hiring agreement. The words "in the event of the termination of the hiring "agreement" are clearly a condition precedent to the recourse agreement coming into operation at all. The question in this case is whether the condition precedent has been fulfilled and whether the hiring agreement was terminated. The finance company submit it was terminated under clause 3, which says: "Should the hirer make default in any monthly payment as "agreed or commit any other breach of this agreement . . . the "owner shall have the right at any time to declare the hiring "terminated and to retake possession of the said motor-vehicle."

[His Lordship then stated the facts, and continued:] The whole question in this case is whether the letter of July 28, 1949, from the finance company to the dealers terminated the hiring. It was not sent to the hirers, but only to the dealers. If it was sufficient to terminate the hiring, then it is quite clear that the recourse agreement came into operation. But if the letter did not terminate the hire-purchase agreement, then, of course, the recourse agreement did not come into operation.

Sellers J. made it clear that, apart from the authorities, he would have held that the hiring was not terminated, because there had been no notice sent to the hirers. But he thought, by reason of the decision in *North Central Wagon and Finance Co. Ld.* v. *Graham*,[3] he was constrained to come to a different conclusion. In my view Sellers J.'s own unaided judgment was correct. This hiring agreement could not be terminated simply by a letter from the finance company to the dealers.

I asked Mr. Hudson whether his argument meant that if the finance company wrote a letter to a garage asking them to collect the van, or if one clerk in their office told another clerk in the office that the agreement was terminated, that it would at

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[3] [1950] 2 K.B. 7.

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once automatically terminate. He was forced to say "Yes." That rather reminds me of the solicitor's office which was said to have an informing clerk and a believing clerk for the purpose of making affidavits on information and belief. In the present circumstances there might be a declaring clerk and a hearing clerk for the purpose of determining such an agreement.

In my opinion, under the terms of the hiring agreement, in order to terminate it, there must be a declaration by the finance company communicated to the hirer, or some unequivocal act equivalent to a declaration to the hirer such as an actual retaking of possession. Nothing short of that will suffice because, with clauses of this kind, as with forfeiture clauses in leases, a breach never terminates the letting automatically but only makes the letting voidable at the election of the lessor. There must be some unequivocal act by him evincing his election before the lease can be said to be actually terminated. See the notes to *Dumpor's* case.[4]

In this case the agreement provides the nature of the act which must be done: the finance company must "declare the "hiring terminated." A mere declaration in the mind of the party, or even to his agent or to a third party, will not do; it must be a declaration communicated to the hirers who are affected by it, or an unequivocal act which is equivalent to a declaration to the hirers.

For that reason I am satisfied the mere communication of the letter of July 28, 1949, to the dealers was not a termination of the hiring. The recourse agreement, therefore, never came into operation.

I must say a word about the case on which Sellers J. was persuaded to decide otherwise. In that case, the hirer had, himself, sold the car in complete defiance of the agreement of bailment. He had sold it through an auctioneer, and the claim was against the auctioneer for conversion of the goods. In order to sustain a claim in conversion, it is essential that the bailor should have the right to immediate possession; or that the hiring should be determinable at will. It is not necessary that it should in fact be terminated. In that case the hiring was determinable at will, by reason of the sale having been made. It was not automatically terminated. In none of the judgments is there any statement that it was terminated, whereas in the present case, in order that the recourse agreement should operate, it must be actually terminated.

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[4] (1601) 4 Co.Rep. 119b, in 1 Smith, L.C., 13th ed., 38.

There is an observation of Asquith L.J.[5] which I think must have led Sellers J. to take the view he did. Asquith L.J. said: "The question, to my mind, really reduces itself to this: on the "true construction of this contract, was any notice needed to "terminate the agreement?" Reading that passage alone, it would look as though Asquith L.J. was holding that no notice was necessary to terminate the agreement. But I think that, when one reads the judgment of the court as a whole, particularly the last few words of the judgment of Asquith L.J.,[6] and the judgment of Cohen L.J., it becomes quite plain that the ratio decidendi of that case was, not that the agreement had been terminated, but that it was determinable at will by reason of the sale which had taken place. That being so, the case is distinguishable from the present because in this case it is necessary that the hiring agreement should be terminated and there has never been a declaration within clause 3 sufficient to terminate it.

For those reasons, in my opinion the appeal should be allowed.

HODSON L.J., after stating the facts:—Sellers J. quite clearly would have found in favour of the defendants had he not been persuaded to do otherwise by the decision in *North Central Wagon and Finance Co. Ld.* v. *Graham.*[7] Sellers J. said: "Under the general law a contract, though broken, does not "terminate automatically; it is left open for the party who has "the right to treat the contract as at an end, if it is a funda- "mental breach, either to treat that as a termination of the "contract or to ignore it and treat the contract as still subsisting. ". . . But in the case of the *North Central Wagon and Finance* "*Co. Ld.* v. *Graham,*[7] a clause very similar to this one in its "effect was brought into consideration."

The clause under consideration in this case is clause 3 of the hiring agreement which contains the words "the owner shall "have the right at any time to declare the hiring terminated," whereas the words in *North Central Wagon and Finance Co. Ld.* v. *Graham,*[7] which deal with a hiring agreement, were "may "terminate the hiring." In this case nothing was done by the plaintiffs vis-à-vis the hirers to terminate the hiring. So, by the ordinary law of contract, the contract was not terminated and it could not, therefore, be properly said that by the letter of July 28, 1949, written by the plaintiffs to the defendants, any termination could have been brought about, because that was a letter not written to the hirers at all.

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[5] [1950] 2 K.B. 7, 13.

[6] [1950] 2 K.B. 7, 14.

[7] [1950] 2 K.B. 7.

For myself I think it is unnecessary to go into the nice question whether there is any difference in the wording of the particular contracts between "declare the hiring terminated" or "may terminate the hiring." Sellers J. felt himself constrained to consider that distinction; but I think there is the fundamental difficulty here in the way of the plaintiffs that, on any view, the contract has not been terminated.

North Central Wagon and Finance Co. Ld. v. *Graham*[7] is not, in my view, decisive of this case. I think the effect of that decision, to which Singleton L.J. was a party, is correctly summarized in the headnote: "On the breach by the hirer of "his stipulations under the agreement, the owners had the right, "not merely to terminate the agreement, but to the immediate "possession of the motor-car; that their right to possession arose "as soon as the defendant was instructed to sell the car." There is no finding of the court in that case that the agreement in question had actually been terminated, but merely that there was a right to terminate and, accordingly, a right to the immediate possession of the motor-car which had been sold.

That is put quite shortly by Cohen L.J.[8] He is founding himself upon a passage in Halsbury's Laws of England, 2nd ed., Vol. I, at p. 736; "The act of the bailee in doing something "inconsistent with the terms of the contract terminates the "bailment, causing the possessory title to revert to the bailor, "and entitling him to maintain an action of trover."

I fully agree with the judgment which Denning L.J. has delivered and I have only added a few words of my own out of respect to Sellers J. who, I feel sure, would have arrived at the same conclusion at which this court has arrived had it not been for the fact that he was persuaded otherwise by some of the language used by Asquith L.J. which, taken out of its context, might lead to an opposite conclusion.

I agree, therefore, that the appeal should be allowed.

SINGLETON L.J. I agree, and I base my judgment solely on the fact that no question can arise under that which is called the "recourse agreement" until the termination of the hiring.

Clause 3 of the agreement of hiring provides that, in certain events, the owner shall have the right at any time to declare the

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[7] [1950] 2 K.B. 7.

[8] [1950] 2 K.B. 7, 15.

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hiring terminated. It is said on behalf of the finance company that that was done by a letter of July 28, 1949, addressed by the finance company to the motor dealers who were not parties to the hiring agreement at all. I do not think that that letter of July 28 can be read as terminating the hiring or declaring it terminated. Before that can be done under the terms of this hiring agreement, it seems to me that there must be a declaration, or notice, to the hirer, or some act towards him showing unequivocally that the hiring agreement was terminated.

Appeal allowed.
Judgment for the defendants.

Solicitors: *Albin Hunt and Stein; J. H. Fellowes.*

E. D.

C. A.

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May 19, 20, 21 *and* 22.

Singleton, Denning and Hodson L.JJ.

JONES *v.* MANCHESTER CORPORATION AND OTHERS.

Negligence—Indemnity and contribution—Master and servant—Negligence of servant—Whether liable to indemnify master—Doctor employed by hospital board—Negligence of doctor—Death of patient—Insufficient experience of doctor.

In an action by the widow of J. suing a doctor, who had been qualified for five months, and the hospital board, who had employed her, the judge found that the doctor was negligent in the administration of an anæsthetic to J., as the result of which he died. He gave judgment for the plaintiff against the doctor and the board for damages. The hospital board and the doctor each claimed an indemnity against the other for any damages or costs either might be called on to pay to the plaintiff. The judge ordered the board to indemnify the doctor against any damages and costs which she might be called on to pay on the ground that they had allowed a doctor with such slight experience to administer pentothal, a barbituric. The doctor had given anæsthetic on about 100 occasions and pentothal on some 20 occasions. The hospital board appealed.

The appeal was allowed. Singleton and Denning L.JJ. held that the hospital board were negligent, not merely vicariously, and that the doctor was negligent, not only through inexperience but also to some degree in not carrying out what she had been taught. They apportioned the responsibility under section 6 of the Law

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Reform (Married Women and Tortfeasors) Act, 1935 as to 20 per cent. on the doctor and as to 80 per cent. on the hospital board.

Hodson L.J. (who dissented) would have granted the hospital board the full indemnity for which they asked, since there had been a breach of a term necessarily to be implied in the contract between the hospital board and the doctor that she would exercise reasonable skill and care. Spondes peritiam artis. He could not agree that the trial judge was right in attributing negligence (other than vicarious) to the hospital board. There was no evidence to justify a finding that a qualified doctor should not be entrusted with the use of an anæsthetic of a kind which was in constant use, without further assistance than she had. There was no room for the operation of section 6 of the Act of 1935.

Per Denning L.J. The hospital board had contended that, in English law, if a master were made liable for the negligence of his servant, he was entitled to an indemnity from that servant. That had often been assumed to be the law (see Salmond on Torts (7th ed.) at p. 105, and the Report of the Law Revision Committee, 1934, Cmd. 4637 at p. 7), but he knew of no case in which that had actually been decided and, for his part, in the absence of express stipulation, he could see no contractual basis for such an indemnity. Today the issue was entirely a matter for the discretion of the court exercised under the Law Reform (Married Women and Tortfeasors) Act, 1935, whether it should order any, and if so, what contribution or idemnity between them.

APPEAL from Oliver J.

On January 11, 1950, William Jones was accepted as a patient at Ancoats Hospital for first degree burns on his face and on part of his neck. A house surgeon, Dr. Sejrup, in charge of the operation of cleaning up the patient's face, decided that the patient should be anæsthetized with nitrous oxide gas with oxygen by means of a mask over his face. Dr. Olive Cynthia Wilkes administered this by means of a mask. Dr. Sejrup had been qualified for two years and Dr. Wilkes for five months. She was employed as house surgeon and physician as from July 23, 1949, being fully qualified as a bachelor of medicine and surgery, and her training included the administration of anæsthetics, including pentothal. She had given anæsthetics on about 100 occasions including about 20 when she used pentothal. It was part of her duty to administer anæsthetics, when required, in the casualty department. In the event of requiring help or instruction in case of need she had been given a list of medical men on whom she could call, the last on the list being Dr. Sejrup.

When the patient had become unconscious or semi-conscious —unable to count—Dr. Sejrup found that the mask covered some of those parts of the patient's face which had been burned. The administration of the anæsthetic by the mask was described by Singleton L.J. as a wholly unintelligible and futile proceeding which it might be was the originating cause of what happened subsequently. It was then decided to inject pentothal, a drug of the barbituric group which ought to be administered with great care, and Dr. Wilkes injected pentothal—ten cubic centimetres, the normal dose for a patient who was not under another anæsthetic—in two lots, first about one-half, and then after a pause the other half. The patient then died.

The plaintiff, the widow, brought her action against the Manchester Corporation (who were the employers of the deceased man at the time he received the burns) under the Fatal Accidents Acts, 1846 to 1949, and the Law Reform (Miscellaneous Provisions) Act, 1934, and subsequently added Dr. Wilkes and the Manchester Regional Hospital Board as defendants. By her defence Dr. Wilkes denied negligence, and the board by their defence denied her negligence. Oliver J. found that Dr. Wilkes was guilty of negligence causing the death in the administration of pentothal to a patient who had already been anæsthetized, according to the judge's findings, for a period of from three to five minutes, both in respect of the amount of pentothal given and the speed with which it was given—the period being too short between the two doses. His Lordship gave judgment against Dr. Wilkes and the hospital board for £1,438 5s. 3d. He also gave judgment against the Manchester Corporation for £5 damages in respect of the pain and suffering caused to William Jones before his death.

Before the action the hospital board had served on Dr. Wilkes a notice under R.S.C., Ord. 16A, r. 12, claiming (1) contribution or indemnity under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, and (2) damages for breach of contract in such sums as the plaintiff might recover against the board. After the evidence had been given, but before judgment, Dr. Wilkes gave notice that she would ask for an indemnity from the board. By consent no pleadings were ordered on either of the notices.

Oliver J. ordered the board to indemnify Dr. Wilkes against all damages and costs she should be called on to pay to the plaintiff. His Lordship said: "I think to put a weapon like a barbituric "within reach of a girl who has only been qualified for five months "and expect her to handle it accurately, with sufficient knowledge "and experience—to watch the way a patient has to be watched— "is simply asking for trouble."

The hospital board appealed against this order granting Dr. Wilkes an indemnity, claiming that they should have been granted an indemnity by her against any damages and costs they might be called on to pay to the plaintiff, since she was wholly to blame.

Beney Q.C. and *J. D. Cantley* for the defendants, the hospital board. In the statement of claim the plaintiff only alleged vicarious liability on the part of the hospital board. The trial judge found that Dr. Wilkes was negligent in the administration of pentothal, presumably on the evidence as to the amount given when the patient was already under another anæsthetic and also as to the speed with which it was administered and, it may be, failure to watch the patient carefully during the administration. It seems that the judge found that Dr. Wilkes was not sufficiently experienced to administer pentothal and should not have been allowed to do so, and on this ground he granted Dr. Wilkes an indemnity against the hospital board for all damages and costs she might have to pay to the plaintiff—a case which the plaintiff had not pleaded.

It is submitted that the trial judge had no right to grant this indemnity and, if he had the right, he should not have done so. On the contrary, he should have granted an indemnity to the hospital board against Dr. Wilkes for all damages and costs the board had to pay to the plaintiff. The only negligence proved was that of Dr. Wilkes. Dr. Chadwick, the specialist anæsthetist for the group of hospitals of which the Ancoats Hospital was one, said in evidence that it was the usual practice to allow a girl of this experience to act in this way without supervision, and Mr. Tilney Evans, a specialist anæsthetist, when asked by the judge, "Tell me as man to man whether you would put a girl in such a "position," replied: "Yes, she is qualified to give anæsthetics." And there was no evidence to the contrary. Dr. Wilkes was fully qualified as a bachelor of medicine and surgery and, as such, she was employed by the hospital board. As Willes J. said in *Harmer* v. *Cornelius*[1]: "When a skilled labourer, artizan or "artist is employed, there is on his part an implied warranty that "he is of skill reasonably competent to the task he undertakes— "spondes peritiam artis. Thus, if an apothecary, a watchmaker "or an attorney be employed for reward, they each impliedly "undertake to possess and exercise reasonable skill in their "several arts. The public profession of an art is a representation

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[1] (1858) 5 C.B.N.S. 236, 246.

"and undertaking to all the world that the professor possesses "the requisite ability and skill. An express promise or express "representation in the particular case is not necessary." The indemnity claimed by the hospital board should be granted on the ground that Dr. Wilkes was in breach of a term necessarily implied in her contract of employment by the board.

In Salmond's Law of Torts, 10th ed., at p. 78, the editor writes: "It would seem clear on principle that in all cases of "true vicarious liability the person held vicariously liable for the "tort of another should have a right of indemnity against that "other. Thus, a master who has paid for the negligence of his "servant should be able to sue that servant for indemnity. That "this is generally so cannot be doubted, but in *Ryan* v. *Fildes*[2] "Tucker J. was prepared to believe that there might be cases "in which it was not."

If the case is, contrary to our contention, a case for contribution and not one of indemnity, the responsibility, if not wholly, was almost wholly that of Dr. Wilkes, and if section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, is applicable, that fact should be recognized in any apportionment which should be made: see *Ryan* v. *Fildes*.[2]

[*Mowbray* v. *Merryweather*[3] was referred to.]

H. I. Nelson Q.C. and *C. T. B. Leigh* for Dr. Wilkes. The trial judge here found the hospital board to blame in permitting Dr. Wilkes to administer this anæsthetic without more adequate supervision. And the court will not disturb this finding. The liability of the hospital was not merely vicarious. Both Dr. Wilkes and the hospital board being found negligent, the board cannot succeed in their claim for an indemnity. It is submitted that the trial judge, in giving an indemnity to Dr. Wilkes, was not giving a contractual indemnity but was acting under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. In making that apportionment, he found practically the whole of the responsibility lay with the hospital board and, on his findings, it is submitted that that decision was right. The main cause of the disaster was the administration of pentothal to a patient already anæsthetized. The effect of this Dr. Wilkes, by reason of her inexperience, did not know. There is no decision in the books that, if a master is made liable for the negligence of his servant, he is entitled to indemnity from that servant; in each case that must depend on whether there is an express stipulation to that effect in the contract between the master and the servant; there is no implied term to that effect and the master has no right at law to an indemnity or contribution from his servant.

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[2] [1938] 3 All E.R. 517.

[3] [1895] 2 Q.B. 640.

J. D. Cantley replied.

Cur. adv. vult.

SINGLETON L.J. This appeal relates only to the position as between Dr. Wilkes and the hospital board, the submission made on behalf of the board being that far from the board being held responsible to indemnify Dr. Wilkes, the order ought to have been that Dr. Wilkes should indemnify the board.

It is desirable that I should say something as to the facts. When Jones arrived at the hospital he was seen by two young doctors, Dr. Sejrup, who obtained his qualifications in 1947, and Dr. Wilkes, who obtained her degrees in 1949, and had been appointed to the hospital some five months before the date of the death of Jones. On that day she was acting as anæsthetist. She had passed her examinations as surgeon and doctor, but she had no special qualifications as an anæsthetist, and not much experience. As the judge pointed out, for many years anæsthetists have been regarded as a special branch of the profession. It is a fact that to anæsthetize a human being, to deprive him of consciousness, is to take a considerable step. If it is in the hands of experienced people very little danger exists, but to allow inexperienced people to practise that without supervision is a serious thing. The two young doctors decided to clean up the face, on which the burns were, under an anæsthetic. Jones got on to the operating table himself, at about 5.15 p.m. He was in perfectly good health; he was suffering pain from his burns, but he was not in a serious condition otherwise. When he was on the table Dr. Wilkes first applied nitrous oxide gas with oxygen by means of a mask over his face. It is perhaps strange, and it shows the inexperience of those concerned, that they should have taken that course when the operation involved attending to the face, for it meant that the face would be covered by the mask. When it was realized that the mask would be in the way for that which Dr. Sejrup had to do, it was decided to change and to give an injection of pentothal. Pentothal is one of the barbituric group; it is dangerous; there is no question about that; and though, as time has gone on, it has become much more used, it is still a drug which ought to be administered with great care. Dr. Wilkes sent the nurse for pentothal. She brought it. By that time Jones had been under gas for some minutes; he was not conscious, and he could not be asked to count. One of the recognized practices is to ask the patient to count, so that it is possible to tell when the stage of complete anæsthesia is reached. The dose of pentothal which was administered by Dr. Wilkes was the ordinary dose which is given to a person who has not had any other anæsthetic, ten cubic centimetres. At the time that the injection was given the patient was not conscious; he may have been semi-conscious; he had been, according to the judge's finding, under gas for some three to five minutes. Ten cubic centimetres of pentothal was taken into the syringe, and the whole of the ten cubic centimetres was injected by Dr. Wilkes in two lots; first, approximately half the amount; there was a pause, the length of which is all-important, and then the other half was injected. By the time that was completed the patient was, in fact, dead.

On the hearing a considerable body of expert medical evidence was called as to the cause of death and as to the administration of pentothal. Mr. Blain was called on behalf of the plaintiff, Mr. Postern and Mr. Dodds on behalf of the Manchester Corporation, and Mr. Evans on behalf of Dr. Wilkes. The two last named are anæsthetists of great experience.

I refer to certain passages in the judgment of Oliver J. to see how he states the evidence of those expert witnesses. He said: "Mr. Blain says that death should not occur if proper care "is taken. Mr. Postern said the same. Mr. Dodds said the "danger is not the pentothal, not the drug, but the method of "administration. Two main points were made against Dr. Wilkes, "in regard to administration. The first point made was that she "administered pentothal on top of nitrous oxide without waiting "for the patient to recover. The evidence on that, given by "Mr. Blain, the surgeon, was this; I need not read it in full. "He said the effect of nitrous oxide would be to produce a con- "dition known as anoxia, that is the lowering of the standard "of oxygen in the blood, and to administer pentothal, in those "circumstances, when the man was only semi-conscious, was "wrong; and then, with that great loyalty to his profession, he "watered that down to 'not wise.' He said pentothal acts on "the breathing and on the circulation and heart, and adds to "the effect of anoxia produced by the nitrous oxide, and until "the effects of nitrous oxide have passed away it should not be

" administered. This young lady did not know that. Obviously, " she had never heard of it. She had never considered it. She " did not consider it because she was inexperienced, not because " she was careless. She never considered the problem of giving " pentothal on top of a more or less heavy impregnation of nitrous " oxide gas. She was a surgeon, doctor, anæsthetist, of five " months' experience."

The trial judge pointed out that Mr. Postern agreed in general with Mr. Blain's views, though he made some reservations. Mr. Dodds, he added, said that only quite a light anæsthesia was necessary. Then he said this which, to some extent, is comment upon Mr. Blain's evidence: " 'An inexperienced anæsthetist " 'should allow the patient to recover from the nitrous oxide " 'before going to pentothal.' He said it is common to ask the " patient to count. This patient could not be asked to count " because he was not conscious. He said, 'I do not do it myself. " 'I have 28 years' experience, but the teaching is to count.' " She knew that, but she said she could not ask him to count. " You cannot ask an unconscious patient to count. 'If I gave " 'pentothal to a patient semi-conscious from nitrous oxide, I " 'would do it very slowly and I would watch very closely.' "

" He then proceeded to detail a number of symptoms to look " for. I shall not detail them in this judgment, because I do not " think it is worth while. Obviously, the eye of experience can " see what is happening to a patient, such matters are those con" nected with rigidity of the muscles, breathing and, naturally, " with the eyes. He said: 'I should have given this man three " 'to four—not more—cubic centimetres out of ten, very, very " 'slowly indeed. In these circumstances, I think there was an " 'overdose here, in terms of volume or speed, or both. She ought " 'not to have given all the ten cubic centimetres in two shots. " 'It should have been no more than was absolutely necessary to " 'keep him under, and that by degrees.' "

I read a further passage from the judgment: " In cross" examination by Mr. Nelson Mr. Dodds said, 'The pause should " 'be half-a-minute or more. I do not agree that you would " 'then give the other half. The teaching to give the second " 'half does not apply to a man in this condition but to a person " 'who starts fully conscious. Three to four cubic centimetres " 'is all I would have given over the whole operation. I think " 'ten cubic centimetres is more than enough for the whole job, " 'even if the patient were not already semi-conscious from the " 'nitrous oxide. The dose is cumulative.' "

The judge said, with regard to Mr. Evans, that he did not disagree in principle with what the other witnesses had said upon this subject, but that, if he had done, he (the judge) would have preferred the evidence of those whom I have mentioned already. The most important of the witnesses were Dr. Wilkes and Dr. Sejrup. The judge found himself unable to accept the evidence of Dr. Wilkes in some respects. This is what he said: "With "regard to Dr. Wilkes, I have got to find out whether I can "accept her evidence on the facts. Her evidence of fact was "this: 'I did everything the book says is right, everything I "'have been taught. I had never before, it is true, embarked "'upon anæsthetizing someone who was already half conscious "'as the result of another administration of a different anæs-"'thetic. I had never done that.' Of course, she knew nothing "at all about it, or the risks involved—heavy risks, according "to the evidence on the other side. She said: 'When I started "'he was perfectly well, and a very good colour. I administered "'the first half of my syringeful of pentothal slowly. I watched "'half a minute or more'—30 to 60 seconds, she said she "watched—'then I slowly administered the rest. During the "'whole of that administration, no change whatever had come "'over this man.'"

The judge said: "I find it quite impossible to believe "that, considering that when the last cubic centimetre was "injected he was dead. Then she found his heart had failed. "So his heart would fail, if it was being over-injected with "pentothal or at too great a speed. That, of course, had to be "admitted. This young lady gave evidence before the coroner "and the question of timing was not thoroughly discussed at all, "but she had given evidence before him, and then, when giving "evidence here, she suddenly said, 'I took my watch out when "'I was doing this.' Well, I am afraid that is all her imagina-"tion. I do not believe it, because no one would time something "as between 30 and 60 seconds with a watch. That she exercised "a certain amount of deliberation, that is to say, she did not "shoot the whole dose in at once, is borne out by the evidence." Thus it is clear that Oliver J. did not accept the evidence of Dr. Wilkes in all respects.

Dr. Sejrup, who was to have done the cleaning-up operation, said he watched what Dr. Wilkes was doing, and he added, in answer to questions: "She gave pentothal in what is described "in the text-books as the correct method, dividing the dose—"which was a ½-gramme dose—into two parts, giving both parts "slowly, with an appreciable pause in between them. From "time to time I watched the face of the patient"; and when asked: "How long did Dr. Wilkes wait between the two halves "of the operation?" he replied: "An appreciable time. "Accepting the fact I had not a stop-watch, I suppose between "20 and 30 seconds—20 would be the absolute minimum." When Dr. Sejrup was cross-examined, it appeared that he had made a statement at an earlier date in which he had said that the interval, or pause, was about 10 seconds, and that that was not long enough; and he had said in that statement that, from commencing the injection to the completion of it, he estimated that not less than 40 to 45 seconds elapsed. He agreed that if his estimate was accurate, the anæsthetic was given contrary to all proper teaching; and, in reply to a further question, he agreed that there is inherent danger in speed.

Dr. Wilkes had said that she injected five cubic centimetres slowly; stopped for a period of between half-a-minute and a minute to see what effect it had; saw that (as far as she could judge) it had no effect whatever, which rather surprised her, and then injected the other five cubic centimetres slowly. As she finished she noticed that the patient was not breathing. In cross-examination she was asked why she waited, and she said: "Because I had been taught to do so, because the effect of "pentothal takes a time to establish, and until you see how the "patient reacts to the first amount you cannot tell how he will "react to the remainder." She said the question as to whether it was legitimate to give pentothal before a patient had recovered from nitrous oxide had never been discussed, so far as she remembered.

Oliver J. was satisfied that the death of Jones was caused through negligence in the administration of the anæsthetic. It is not quite clear on which ground, or grounds, he based his finding, but it may be that there were three at least: (a) The speed at which it was administered. The judge said: "Certainly 40 or 45 seconds is much too little. Speed involves "danger. The second shot should be slower than the first. It "was not. If done in 40 to 45 seconds there was a risk." (b) The amount of pentothal injected, having regard to the fact that the patient had not recovered consciousness after the administration of nitrous oxide. The judge accepted the evidence of Mr. Dodds, who said that three to four cubic centimetres was all that he would have given over the whole operation, and that 10 cubic centimetres was more than enough even if the patient was not already unconscious from the nitrous oxide. (c) Failure to watch the patient carefully during the administration of the pentothal. The judge did not accept Dr. Wilkes's evidence on this point. Oliver J. said: " She said, ' When I started he was " ' perfectly well, and a very good colour. I administered the " ' first half of my syringeful of pentothal slowly. I watched half " ' a minute or more '—30 to 60 seconds, she said she watched— " ' then I slowly administered the rest.' Then she added: " ' During the whole of that administration, no change whatever " ' had come over this man.' " The judge evidently found it quite impossible to believe that.

The order against which this appeal is directed is in these terms: " And it is further ordered that the defendants Manchester Regional Hospital Board do indemnify the defendant " Wilkes against all damages and costs the said defendant Wilkes " is called upon to pay to the plaintiff and that in the event of " the said defendant Wilkes paying to the plaintiff the said sum " of £1,438 3s. 3d. and costs as aforesaid the said defendant " Wilkes be at liberty to sign judgment against the said " defendants, Manchester Regional Hospital Board, the amount " of the judgment debt and costs so paid."

I think it is clear that Oliver J., having given judgment against both Dr. Wilkes and the hospital board, was not granting an indemnity arising from, or through, the contract between those parties, but was applying section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Under sub-section (2) the court has power to exempt any person from liability to make contribution, or to direct that the contribution shall amount to a complete indemnity. Tucker J., in *Ryan* v. *Fildes*,[4] said[5]: " This section makes it clear that the order as to contribution and " the extent of the contribution is within the discretion of the " court, because the language is ' may recover contribution.' " Oliver J., at the end of his judgment, said: " So far as the " application is concerned that she should contribute or that she " should indemnify the board, I will not order her to contribute " to the extent of a penny piece."

Under the order, Dr. Wilkes is absolved from paying any part of the damages or costs recoverable by the plaintiff; or perhaps I should say that, if she is called upon to pay by the plaintiff she can recover from the hospital board anything she pays. The submission made on behalf of the hospital board is that the order is wrong, and that on the facts as found by the judge the board ought to have been granted an indemnity against Dr. Wilkes; or at least that she ought to have been ordered to contribute towards the damages awarded to the plaintiff. The claim of the board is based, in the first place, on the contractual relationship between the parties, from which, it is said, there must be implied an undertaking to indemnify the board in respect of any negligence on the part of the doctor for which the board is found responsible. There was on the record a plea by which the board denied that Dr. Wilkes was their servant, or that they had any right of control over her in relation to medical treatment given by her, and in particular in relation to the administration of the anæsthetic. No such point was raised on the trial, or in this court, and the case was argued on the basis that the relationship of master and servant existed as between the board and Dr. Wilkes. I find it difficult to deal with the claim under this head without further elucidation as to what was the contract between the parties. In *Eastern Shipping Co. Ld.* v. *Quah Beng Kee*,[6] Lord Wrenbury said: "A right to indemnity generally arises "from contract express or implied, but it is not confined to cases "of contract. A right to indemnity exists where the relation "between the parties is such that either in law or in equity there "is an obligation upon the one party to indemnify the other. "There are, for instance, cases in which the state of circum-"stances is such that the law attaches a legal or equitable duty "to indemnify arising from an assumed promise by a person to "do that which, under the circumstances, he ought to do."

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[4] [1938] 3 All E.R. 517.

[5] Ibid. 525.

Dr. Wilkes had been qualified about five months; she was appointed after an interview. There is nothing to show what the board knew of her, except that she had obtained her medical degrees. I suppose it may be said that they were entitled to expect that she had the knowledge and skill of a newly qualified doctor, and that she would exercise that degree of skill. I think, too, that in such circumstances there must be implied an undertaking by the board that they would provide some reasonably competent person to work with her, or to guide her in case of difficulty. A newly qualified doctor cannot know much of drugs such as pentothal, or of the dangers arising therefrom, and it is not reasonable, or safe, that he or she should be left without guidance or help on such matters. That was the view which Oliver J. took. He said: "I think to put a weapon like a

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[6] [1924] A.C. 177, 182.

"barbituric within reach of a girl who has only been qualified for "five months and expect her to handle it accurately, with "sufficient knowledge and experience—to watch the way a "patient has to be watched—is simply asking for trouble. I "cannot help it, if it is common practice." Dr. Sejrup was with her at the time of the giving of the anæsthetic. He, too, was a house surgeon at the hospital; he was senior to Dr. Wilkes, and he had been qualified just over two years. According to the evidence given by Mr. Dafforne, Dr. Sejrup was in charge of the operation, and he was a person to whom Dr. Wilkes might apply for help or instruction in case of need. It does not appear from the evidence that he had much more knowledge of the danger of the use of pentothal than had Dr. Wilkes. It was he who decided to start with the mask and nitrous oxide, a wholly unintelligible and futile proceeding which, maybe, was the originating cause of the trouble. After it was appreciated that it would be difficult to clean the patient's face when the mask was on it, a change was decided on. "Jointly we had to turn to a drug such as "pentothal, because of the mask," he said; and he gave evidence to the effect that all was done quite properly. It did not cross his mind that the administration of pentothal to a man who was substantially doped with another drug was an unwise thing to do. He had made a statement from which it appeared that the speed at which the injection of pentothal was given was too great, or that there was not sufficient interval between the two injections of it.

I am unable to see that there is any difference between the responsibility of Dr. Sejrup and of Dr. Wilkes. It was the hand of the latter by which the drug was administered, but they were both together, and both had agreed upon a course of action. Dr. Sejrup was the senior, and he was a servant of the hospital board. So far as we know, neither of these young doctors had been given any instruction as to the danger of using pentothal when a patient was still partly unconscious from the use of nitrous oxide, or of the great need for careful watching in such a case. Oliver J. considered that blame attached to the hospital by reason of the system, or lack of system. I cannot help feeling that Dr. Sejrup displayed a lack of care, or was wanting in knowledge, and he was acting as casualty officer on the day in question. I realize that he is not a party to the proceedings, and that there was no allegation against him on the pleadings, but he gave evidence, and the court is entitled to consider the answers he gave on the issue between Dr. Wilkes and the hospital board. He was a servant of the board.

The case of the plaintiff in the action was based on negligence in the administration of the anæsthetic. On the judge's finding both Dr. Wilkes and the hospital board were liable in damages to the plaintiff. It may well be that in the ordinary simple case a servant must indemnify his master against his wrongful acts for which the master is made liable. A chauffeur who, through negligence, causes damage for which his employer is held responsible, may well be liable to his master. On the other hand, if the chauffeur is young and inexperienced, and is suddenly told to drive another and bigger car, or lorry, which he does not understand, and an accident follows, it is by no means certain that the employer would be entitled to an indemnity.

On the facts of the present case, it cannot be said that the death of Mr. Jones was solely caused by negligence on the part of Dr. Wilkes, though that was the basis of the claim against the board. There were other contributory causes on the part of the board or of their servants. The judge was not bound to accept the evidence of Mr. Evans that it was not unreasonable to expect a doctor of Dr. Wilkes's experience to carry out the duties put upon her. Mr. Evans, indeed, at the end of his evidence, said that a very hard task was put upon her. In the tenth edition of Salmond on the Law of Torts, at p. 78, I find this passage: "It "would seem clear on principle that in all cases of true vicarious "liability the person held vicariously liable for the tort of another "should have a right of indemnity as against that other. Thus, "a master who has paid for the negligence of his servant should "be able to sue that servant for indemnity. That this is "generally so cannot be doubted, but in *Ryan* v. *Fildes*[7] Tucker "J. was prepared to believe that there might be cases in which "it was not." The employer cannot have a right of indemnity if he himself has contributed to the damage, or if he bears some part of the responsibility therefor; and the same reasoning applies if some other and senior employee's negligence has contributed to the damage. On the facts of this case, I feel bound to reject the claim of the hospital board to an indemnity against Dr. Wilkes. I mentioned in the course of the argument the desirability of pleadings and of discovery if a question such as this was to be raised. Without this it is not easy to determine the true terms of the contract between the parties. All that we know is that

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[7] [1938] 3 All E.R. 517, 525.

Dr. Wilkes was appointed a house surgeon at the hospital a short time after she had been qualified, and after an interview. There is no evidence to show that she was ever instructed, or advised, at the hospital as to the use of drugs.

The next question for consideration is whether the judge was right in ordering that Dr. Wilkes was entitled to a contribution from the hospital board which was equivalent to a complete indemnity. Tucker J., in *Ryan* v. *Fildes*,[7] spoke of this as within the discretion of the court. And, indeed, this court has set its face against interference with the proportion of responsibility determined by the judge of first instance. The circumstances are, however, somewhat unusual. The action was based on negligence on the part of Dr. Wilkes, and it was only on the finding of negligence against her that the action could succeed against the board and against her. None the less, the judge, in determining the measure of responsibility as between her and the board was entitled to take into consideration all the relevant matters proved before him. If he had accepted the evidence of Dr. Wilkes he might have been justified in deciding as he did; but he did not accept her evidence. Her case—and it was supported by the hospital board—was that she was not negligent, and that she had followed the recognized practice. The findings of the judge seem to me to show that she did not take the usual time over the anæsthetic, or allow a pause of the length of time which she knew was necessary; and, further, that she did not observe the patient with the care that she should have used, difficult though it may have been in view of his condition. In those respects she was not following that which she had been taught. When these matters are looked upon, it is impossible to say that Dr. Wilkes has no share in the responsibility for the damage, or that her share is only nominal. It seems to me that the judge did not pay sufficient attention to his findings against Dr. Wilkes, and that it would not be right for this court to say that the whole of the responsibility should fall on the hospital board.

I do not consider that this is a case in which either party is entitled to an indemnity against the other. I regard it as one proper for the application of section 6 of the Act of 1935, and I would say that, on the facts, the proportion of responsibility for the damage should be held to be 20 per cent. on Dr. Wilkes and 80 per cent. on the hospital board. The appeal should be allowed to that extent.

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[7] [1938] 3 All E.R. 517, 525.

C. A.
1952

JONES
v.
MANCHESTER
CORPORATION.

DENNING LJ

DENNING L.J. On January 11, 1950, William Jones was burned on the face. He was taken to the Ancoats Hospital in Manchester, where he was accepted for treatment. By accepting him for treatment, the hospital board became under a duty to use reasonable care and skill in their treatment of him. They could not, and did not, themselves perform this duty. They entrusted it to a house surgeon, Dr. Sejrup, who had been qualified for two years, and to a house physician, Dr. Wilkes, who had been qualified for five months. These two did not perform the duty properly, with the result that the patient died. It happened in this way: Dr. Sejrup was in charge of the operation. He decided that the patient should be anæsthetized with nitrous oxide gas. Dr. Wilkes administered this by means of a mask. When this had been done, however, Dr. Sejrup found that the mask covered some of those parts of the patient's face which had been burned, and he could not get at them. So the two doctors decided to change to an anæsthetic which could be administered without a mask, that is, by injection, such as pentothal. Dr. Wilkes made the injection. She injected the amount of pentothal which is normal for a patient who is fully conscious, namely, ten cubic centimetres. Dr. Sejrup knew what she was doing. He watched her as she did it, and he also watched the patient. He said she did it quite properly. Just as she finished the injection the patient died. He died because he was injected with pentothal when he was already anæsthetized under another drug. It is undoubtedly dangerous to give pentothal in such circumstances and it can only be done safely by very skilful and experienced persons. Neither of these two doctors had any experience of this, and neither realized that, in such circumstances, much less than the normal amount of pentothal should be given. Only five cubic centimetres should be given, and not the usual ten, and those five cubic centimetres should be given very slowly, watching the patient closely the whole time to see how it is affecting him. Dr. Wilkes had not been taught this, nor apparently had Dr. Sejrup. So the patient died.

The widow thereupon claimed damages against Dr. Wilkes and the hospital board. The judge found them both liable, and awarded damages of £1,438 3s. 3d. The hospital board then claimed that Dr. Wilkes was liable to indemnify them against this liability. The judge refused their claim. He said he would not order her to contribute to the extent of a penny piece. The hospital board appeal to this court.

C. A.
1952

Jones
v.
Manchester
Corporation.

Denning L.J.

At the outset it is important to notice the state of the pleadings. In the statement of claim it was alleged that Dr. Wilkes herself was negligent, and that the hospital board were responsible for her negligence because she was acting as their servant; but it was not alleged that anyone else was negligent, nor that the hospital board were negligent themselves. In answer to that claim it would be no defence for Dr. Wilkes or the board to say that she had not sufficient experience to undertake the task, or to say that the surgeon in charge was also to blame. The patient was entitled to receive all the care and skill which a fully qualified and well-experienced anæsthetist would possess and use. If Dr. Wilkes failed to exercise that care and skill, she would be liable to the patient for the consequences, no matter that the hospital board knew that she had not sufficient experience for the task, and were much to blame for asking her to do it without proper supervision. If the board were to blame in that respect, it would be no answer to the widow's claim, but it might be very relevant in their claim against Dr. Wilkes. There were, however, unfortunately, no pleadings on this question of indemnity or contribution. The parties dispensed with them. The court has, therefore, to deal with all the issues to which the proved facts give rise.

The first issue is whether the hospital board are in law entitled as of right to an indemnity from Dr. Wilkes. The hospital board contend that, in English law, if a master is made liable for the negligence of his servant, he is entitled to indemnity from that servant. I know that has often been assumed to be the law. (See Salmond on Torts, 7th ed., at p. 105, and the Report of the Law Revision Committee, 1934, Cmd. 4637, at p. 7.) But I know of no case in which it has been actually decided.* In the absence of express stipulation, I cannot see any contractual basis for such an indemnity. A servant promises, no doubt, to do his duty to his master to the best of his ability, but he does not promise to indemnify him against liability to third persons, and I see no reason why any such promise should be implied. The master's claim against the servant, if it exists at all, must, I think, be based not on a promise of indemnity, but in damages for breach of contract. The servant, it can be said, promises to do his work with reasonable care; and if he fails to do so, with the result that the master is made liable to a third person, the master can recover the amount as damages. That is how it was put by

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* But see *Green* v. *New River Co.* (1792) 4 T.R. 590.—Ed.

Warrington L.J. in *Weld-Blundell* v. *Stephens*.[8] But the difficulty about that way of putting it is that, although the servant is alone negligent, nevertheless in the eye of the law the master and the servant are both tortfeasors. They are indeed joint tortfeasors. (See *per* Scrutton L.J. in *The Koursk*.[9]) This is shown by the fact that they could, even in the old days, be sued jointly for the one cause of action. See *Stephens* v. *Elwall*,[10] *per* Lord Ellenborough. If the plaintiff only sued one of them and obtained judgment, it was a bar to an action against the other: *Wright* v. *The London General Omnibus Co.*[11] As they were joint tortfeasors, it followed at common law that, if one of them was made to pay, he could not claim contribution or indemnity from the other, for there could be no contribution between joint wrongdoers: *Merryweather* v. *Nixan*.[12] There were, of course, some exceptions to that rule, but, so far as I know, no exception was ever introduced to allow a master to claim contribution or indemnity from his servant. The true position is, I think, illumined by the parallel case of an independent contractor. When the principal is made responsible for breach of duty, owing to the default of the independent contractor, the principal has a right of indemnity if he has expressly stipulated for it in the contract: *Dalton* v. *Angus* [13] and *Hughes* v. *Percival*,[14] *per* Lord Blackburn. But in the absence of express stipulation he has no right of indemnity at common law, but only a right to contribution under the statute. The reason is because the principal is a tortfeasor jointly with the independent contractor: *Daniel* v. *Rickett, Cockerell & Co. Ld.*[15] and *Wilkinson* v. *Rea Ld.*[16] It is true that in those cases the principal himself is under a duty of care which he cannot get rid of by delegating it to an independent contractor; but that is also the position in most cases of master and servant. It is certainly the position in these hospital cases. The hospital board are under a duty of care and skill to the patient which they cannot escape by delegating it to a doctor on the staff: *Cassidy* v. *Ministry of Health*.[17] The result is that at common law, even if the negligence is only that of one doctor alone, nevertheless the hospital board is a joint tortfeasor with him and cannot at common law claim contribution or indemnity from him. Their claim can only rest under the Law Reform (Married Women and Tortfeasors) Act, 1935. It is significant that there is only one case in the books where a master recovered indemnity from a servant, and he did not recover at common law, but under the Act of 1935. That was *Ryan* v. *Fildes*,[18] where Tucker J. said[19] that it was a matter for the discretion of the court, and he pointedly observed that there might be cases where "the court would not think it right to make an order, either "for contribution or indemnity as between a master and his "servant." That is, I think, the true position. In the absence of an express contract on the matter, the master has no right at law to an indemnity or contribution from his servant. It is entirely a matter for the discretion of the court under the Act of 1935 whether it should order any, and, if so, what contribution or indemnity between them.

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[8] [1919] 1 K.B. 520, 536.

[9] [1924] P. 140, 155.

[10] (1815) 4 M. & S. 259, 261.

[11] (1877) 2 Q.B.D. 271.

[12] (1799) 8 T.R. 186; 1 Smith's Leading Cases, 13th ed., 449.

[13] (1881) 6 App.Cas. 740, 827.

[14] (1883) 8 App.Cas. 443, 446.

[15] [1938] 2 K.B. 322.

[16] [1941] 1 K.B. 688, 702–5.

[17] [1951] 2 K.B. 343.

Such is the position when one particular servant alone is negligent. All the more so when the hospital board itself, or other members of the staff, are also negligent. The hospital board cannot come down upon every negligent member of the staff for a full indemnity. Such a course could only be justified if the hospital board could be regarded as an innocent party who has been made vicariously liable without any fault in them. But the law does not regard them as innocent. It says that they are themselves under a duty of care and skill; and if that duty is not fulfilled, it regards them as tortfeasors and makes them liable as such, no matter whether the negligence be their personal negligence or the negligence of their staff.

In all these cases it is of importance to remember that when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant. The master is never treated as an innocent party. This is well seen by taking a simple case where two cars are damaged in a collision by the fault of both drivers. One is driven by a servant, the other by an owner-driver. The owner-driver can obviously only recover a proportion of the damage to his own car from the owner of the other one; and likewise the owner of the chauffer-driven car can only recover a proportion of the damage to his car. He cannot recover the whole damage from the owner-driver. He cannot claim as if he was an innocent person damaged by the negligence

[18] [1938] 3 All E.R. 517.

[19] Ibid. 526.

of the two drivers. He can only claim upon the footing that he himself is a tortfeasor and that the damage is partly the result of "his own fault" within the Law Reform (Contributory Negligence) Act, 1945. Now, suppose that a third person was injured in the collision, so that the owners of both cars are liable in tort to the injured person for his full damages. The owner of the chauffeur-driven car obviously cannot recover a full indemnity from his servant or from the owner-driver. He cannot claim as if he were an innocent person who has suffered damage as the result of the negligence of the two drivers. He can only claim as a "tortfeasor" for contribution under the Act of 1935.

My conclusion, therefore, is that the hospital board, in this case, was itself a tortfeasor which had no right to indemnity or contribution from any member of its staff, except in so far as the court thinks it just and equitable, having regard to the extent of that person's responsibility for the damage. In considering what is just and equitable, I think the court can have regard to extenuating circumstances which would not be available as against the injured person. Errors due to inexperience or lack of supervision are no defence as against the injured person, but they are available to reduce the amount of contribution which the hospital board can demand. It would be in the highest degree unjust that the hospital board, by getting inexperienced doctors to perform their duties for them, without adequate supervision, should be able to throw all the responsibility on to those doctors as if they were fully experienced practitioners.

Applying this principle to the present case, I find it very difficult to place much blame on Dr. Wilkes. She was not in charge of the operation. Dr. Sejrup was. Moreover, he was, in his own words, "responsible for the administering of "anæsthetics." He decided to use nitrous oxide. That was the first mistake, or, at any rate, the cause of all the trouble. Then they decided together to use pentothal. If that needed special care and skill, he was the one who should tell her what was necessary; because he was, according to the general superintendent, one of the doctors available for her to consult. She administered the pentothal under his very eyes and to his entire approval. In these circumstances, it seems to me that her share in the responsibility is much less than his. But the responsibility of the hospital board is, I think, more than that of either of them. It is obvious that mistakes of this kind should not occur. The board should so run their hospital that they do not occur. They should not leave patients in inexperienced hands without proper supervision. The judge took a strong view about this. I am very reluctant to interfere with his decision. But there is one matter which does affect my mind. It is this: counsel for Dr. Wilkes admitted to us that she was negligent to a degree which was inexcusable even in an inexperienced person. He admitted that, in injecting the pentothal, she must be taken to have allowed only ten seconds between the first five cubic centimetres and the second five, whereas she knew she ought to allow thirty seconds. In view of this admission, I agree with my Lord that she should bear some share of the responsibility, and that it should be put at one-fifth. I agree, therefore, that the appeal should be allowed to that extent.

In leaving the case, I cannot help remarking that at one time masters used to insure their servants against liability. This case seems to show that we are approaching a time when servants will have to insure their masters.

HODSON L.J. This is an appeal from so much of an order of Oliver J. as directed the Manchester Regional Hospital Board to indemnify its co-defendant, Dr. Wilkes, against all damages and costs which she may be called upon to pay to the plaintiff, and gave her liberty to sign judgment against the board in the event of her paying such damages and costs to the plaintiff for the amount so paid.

The action was brought by the plaintiff as widow and administratrix of the estate of William Jones against his employers, the Lord Mayor, aldermen and citizens of Manchester, under the Fatal Accidents Acts, 1846 to 1949, and the Law Reform Act, 1934. The plaintiff was employed by these defendants as a stoker, and met his death on January 11, 1950, following on an injury received in the course of his employment. The plaintiff, by her amended statement of claim, alleged that the death of her husband was caused and contributed to by the negligence of Dr. Wilkes who, acting as servant of the board, administered an anæsthetic under which the deceased died. Both Dr. Wilkes and the board were added as defendants. The Manchester Corporation, while admitting negligence, pleaded that the death of the deceased was solely due to the negligence of Dr. Wilkes, acting as the servant of the hospital board. Judgment was entered against the Manchester Corporation in favour of the plaintiff for £5.

Dr. Wilkes was employed by the board as house surgeon and physician at Ancoats Hospital, and the judge found that she was negligent, and gave judgment accordingly against her in favour of the plaintiff for £1,438 3s. 3d. Judgment was also entered against the board, who were made liable vicariously to the plaintiff, as her employers on the application of the doctrine respondeat superior, but there was no separate allegation of negligence against the board or any of its servants, except Dr. Wilkes. No appeal was entered against that judgment in favour of the plaintiff by any of the defendants. The case was contested throughout on the issue, aye or no, was Dr. Wilkes negligent in the administering of an anæsthetic, and the board supported her on this issue.

On November 3, 1950, the board delivered a notice under R.S.C., Ord. 16A, r. 12, to Dr. Wilkes claiming, in the event of their being found liable to the plaintiff: (1) a contribution or indemnity under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935; (2) damages for breach of contract in such sums as the plaintiff might recover against the board. The claim in contract was put as follows: "In the capacity of house "surgeon at Ancoats Hospital you were at all material times the "servant agent or officer of the defendants Manchester Regional "Hospital Board and under duty to them by reason of your "contract with or your relationship to them to exercise reasonable "skill and care in and about all acts done by you in such "capacity, and you were in breach of such duty in the respects "alleged against you in the amended statement of claim and by "reason of such breach have caused damage to the said board in "such sums (if any) as the said board may be found liable to pay "to the plaintiff by way of damages or costs in this action." After the evidence had been given, but before judgment, the doctor gave notice that she would ask for an indemnity from the board. By consent, no pleadings were ordered on either of the notices.

The board contends that the judge, having found that the death was caused by the negligence of Dr. Wilkes, was in error in ordering the board as her employers to indemnify her, and further contends that relief should be given to the board itself in the terms of its own notice. The contract between the board and Dr. Wilkes was not in dispute. She was employed as house surgeon and physician at the Ancoats Hospital as from July 23, 1949. She was fully qualified as a Bachelor of Medicine and Surgery, and her training included the administration of anæsthetics, including pentothal. Part of her duty was to administer anæsthetics when required in the casualty department of the hospital. If occasion arose in the event of a casualty serious enough to require a more experienced anæsthetist, she had the power to call in a senior anæsthetist. This was the only qualification of this part of her duty. She had given anæsthetics on about 100 occasions, including about 20 occasions when she used pentothal.

On January 11, 1950, the deceased man was examined by Dr. Wilkes and found fit to be anæsthetized preparatory to the cleaning of burns on his face. This operation was to be performed by Dr. Sejrup. The anæsthetic was administered by Dr. Wilkes. At first gas was used, nitrous oxide and oxygen, but the gas mask obstructed the cleaning, and before the patient had come round from the gas, pentothal was used with fatal results. It is unnecessary for me to relate the events which led up to the fatal accident.

The whole case made by the plaintiff, supported by the defendant corporation and contested by the doctor herself and her employers, was that she had been negligent in giving the anæsthetic. No separate allegation was made against the board as to itself, Dr. Sejrup, or any other servant. The judge decided the case on the issues raised and contested before him by making an explicit finding of negligence against Dr. Wilkes. Describing the administration of the fatal injection, the judge used this language: "Forty or 45 seconds is much too little. Speed "involves danger. The second shot should be slower than the "first. It was not. If done in 40 to 45 seconds there was a risk. "In those circumstances, I have come to the conclusion that this "young lady, not through any fault of her own—I do wish to "emphasize that because she has her life and, I hope, a fine "career before her—should never have been put in the position "in which she found herself, in my judgment, and should not "have had access to this drug at all, or have been allowed to "anæsthetize people fully without supervision. In those "circumstances, being a qualified doctor, she has failed, but "through no fault of her own, to exhibit that standard of skill "which she was bound in law to possess, and I must give judg-"ment against her and against her employers. I understand I "am going to be asked to give them an indemnity against her, "but that is a matter which will be heard in due course. The "suggestion is that if they have got to pay, she ought to repay "them, because of what she did. We shall see." In this passage it will be observed that the judge attributes blame to the board for allowing Dr. Wilkes to use the drug in question without supervision. He had in an earlier part of his judgment said this: "To

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"allow inexperienced people to practise this without supervision "is obviously a very serious thing to do. I am not at present "saying it is wrong; I am saying it is very serious, and it has "got to be approached in that spirit." He made his opinion clear again before he made the order under appeal, and after judgment on the main issue had been given, when, before asking a question of Dr. Chadwick, the specialist anæsthetist for the group of hospitals of which the Ancoats Hospital is one, he said: "It is not a question of a specialist anæsthetist; it is a question "of having some sort of skilled supervision of these practices "when in the hands of young and newly admitted practitioners." He then asked: "Do not you think it would be a good thing, "instead of allowing a girl of only five months' experience to do "a thing like this without supervision?" The doctor answered: "it is the usual practice." The judge's anxious consideration of the same topic manifested itself at an earlier stage when Mr. Tilney Evans, a specialist anæsthetist, was giving evidence. He had been a specialist in this branch of medicine for about 15 years, and said that he reckoned to give and supervise 2,000 anæsthetics a year. The judge asked him: "Do you think it fitting that a "girl—she is not much more—with five months' experience as a "surgeon, physician and anæsthetist—would you put her in such "a position yourself?" The doctor answered: "I am afraid it "has been the usual procedure." The next question was: "I "am not asking whether it is the usual procedure, but whether "you would not do it yourself—that is a question you can "answer?" (A) "I have never thought about that." (Q) "I "wish you would think about it now and tell me—never mind "the case you are here to give evidence about, but tell me, as "man to man, whether you would put a girl in such a position?" (A) "Yes, she is qualified to give anæsthetics." There is no evidence to contradict the medical opinion so expressed.

Taking into account that a judge is, in a proper case, entitled to reject uncontradicted evidence, particularly that which may be described as opinion evidence, I cannot agree that the judge was right in attributing negligence to the board. The operation was comparatively simple, and there was nothing apparent in the condition of the patient to call for exceptional measures to be taken. In the circumstances, there was, in my opinion, no evidence to justify a finding that a qualified doctor such as Dr. Wilkes should not be entrusted with the use of an anæsthetic of a kind which is in regular use without the supervision of a specialist or more experienced practitioner.

A subsidiary point was raised in this court which was not mentioned in the court below, namely, that Dr. Sejrup, the operating surgeon, had the opportunity of preventing Dr. Wilkes from giving the pentothal in excessive quantity or at so great a speed, and neglected to do so, so that his negligence should be attributed to the board. No charge of negligence having been made against him at any time, I do not think that the finding of negligence against the board, which was never pleaded, can be supported by finding an act of negligence against another servant of the board, such act also not having been pleaded in answer to the notice given, or at all.

In my judgment, the contractual position of Dr. Wilkes vis-a-vis the board is clearly established by the evidence. The legal position is stated in the judgment of Willes J. in *Harmer* v. *Cornelius*[20]: "When a skilled labourer, artisan or artist is "employed, there is on his part an implied warranty that he is "of skill reasonably competent to the task he undertakes— "spondes peritiam artis. Thus, if an apothecary, a watchmaker "or an attorney be employed for reward, they each impliedly "undertake to possess and exercise reasonable skill in their several "arts. The public profession of an art is a representation and "undertaking to all the world that the professor possesses the "requisite ability and skill. An express promise or express "representation in the particular case is not necessary."

In *Weld-Blundell* v. *Stephens*,[21] Warrington L.J. said, in the course of his judgment: " . . . it may well be that if a servant by "his negligent act inflicts an injury on a third person who "recovers damages therefor from the master, the latter may "recover the amount from the servant in an action against him "for breach of his duty. But in such a case the right of action "against the master and his legal liability themselves result from "the servant's negligent act, and but for that act would not have "existed."

In this case, in my judgment, proof of an express provision to exercise reasonable skill is unnecessary. The breach of duty to exercise reasonable skill and care alleged in the notice given under R. S. C., Ord. 16A, r. 12, has been proved, and the board is, in my opinion, entitled to the relief asked for by the notice given under that rule, because the damages which the board may have to pay flow directly from Dr. Wilkes's breach of contract. There is, in my opinion, no room for the operation of the Law

[20] (1858) 5 C.B.N.S. 236, 246.

[21] [1919] 1 K.B. 520, 536.

Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and no question arises as to the modification of the common law position by the provisions of that section.

I would, therefore, allow the appeal to the full extent on the ground that the defendant, Dr. Wilkes, is in breach of a term necessarily implied in her contract of employment by the board.

Appeal allowed. Order that responsibility for the damage should be 20 *per cent. on Dr. Wilkes and* 80 *per cent. on the hospital board.*

Solicitors: *Sharpe, Pritchard & Co., for P. W. H. Revington, Manchester; Le Brasseur & Oakley.*

C. G. M.

EBBS *v.* JAMES WHITSON & CO. LD.

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Singleton, Denning and Hodson L.JJ.

Factory—Dermatitis from Monsonia wood dust—No precautions taken—No breach of statutory duty—" Provision . . . for . . . adequate ventilation . . . and for rendering harmless . . . dust . . . that may "be injurious to health"—Not applicable to protective gloves, etc.—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 4, 47.

An employee in a coachbuilding factory contracted dermatitis from contact with dust produced by scraping and sandpapering an African hardwood. No special precautions against the dust had been taken in working it as the employers had no knowledge that any risk was involved, the wood not being at that time a well-recognized cause of the disease. In an action against his employers alleging breaches of sections 4 and 47 of the Factories Act, 1937:—

Held, the employers were not in breach of either section.

Section 4 of the Factories Act, 1937, is directed only to ventilation, and the requirement that dust, which may be injurious to health, is to be rendered harmless "so far as practicable," is confined to rendering it harmless "by the circulation of fresh air." That requirement does not extend to the provision of protective clothing, such as gloves or ointment, which were the only effective measures against contracting dermatitis by contact with this dust. The section requires that dust which "may be injurious" is to be rendered harmless, it is therefore immaterial for the section to apply whether the occupiers of a factory know, or ought to know, that the dust may be injurious, though it would be an answer to a claim under section 47 to show that a reasonably well-informed factory occupier did not know that the dust was "likely to be injurious." Section 47 is primarily directed against the inhalation of dust present in substantial quantities and likely to be injurious. In the circumstances of this case it did not apply, for the dust was not present in substantial quantities nor was it likely to be injurious except to a person with a particular idiosyncrasy to the dust.

Decision of McNair J. affirmed.

Appeal from McNair J.

The plaintiff, D. J. Ebbs, was employed by the defendants as a coachbuilder in their factory at Harlington, Middlesex. In or about March 13, 1950, he began a process using Monsonia wood, an African hardwood. In the course of that process, involving scraping and sandpapering the wood, a fine peppery powder was given off, which settled on the workman. On April 4 or 5 he found an intensely irritating skin eruption on his hands and face. It was at first thought that he had eczema and he made two attempts to return to work, but, after a few days in each case, the irritation flared up, and, at the end of April, he was certified as unfit for work and did not return to the defendants' factory. In May, 1950, a specialist in industrial diseases diagnosed contact dermatitis, and that diagnosis was subsequently confirmed.

The plaintiff had worked in the woodworking industry for about 20 years and had not had any skin trouble; it was found, however, that he was idiosyncratic to Monsonia wood dust and that the dermatitis was undoubtedly caused by it. Monsonia wood dust was not at that time a recognized cause of dermatitis, and the defendants had not taken any precautions in working it. The evidence was that this wood was not used in this country in substantial quantities until after the war, and that only two cases of dermatitis were attributed to it, although there were two references in reports of the Chief Inspector of Factories and Workshops in 1935 and 1936, respectively, to the wood as having noxious properties, and in the later report it was said that the skin of some people might be sensitive to the dust from it.

The plaintiff brought an action against the defendants claiming damages. He alleged that the defendants were in breach of sections 4, 42 and 47 of the Factories Act, 1937, and that they were negligent, having no safe system of work, and having failed and neglected to make any inquiries or investigation with a view to ascertaining whether or no the dust was injurious and likely to cause dermatitis. McNair J. dismissed his claim and the plaintiff appealed.

Edgedale Q.C. and *R. T. Monier-Williams* for the workman. The defendants were in breach of their statutory duties under the Factories Act, 1937, and were negligent. The duty imposed on them as occupiers of the factory by section 4 of the Act of 1937 [1] is not avoided by the fact that they seem to have been ignorant of the dangerous character of the dust produced by Monsonia wood. The requirement that dust which may be injurious is to be rendered harmless "so far as practicable" only refers to practical limitations of the methods which can be adopted. The process on which this workman was engaged obviously produced dust and the employers should have made inquiries as to whether the dust so produced might injure his health. On the evidence it is clear that the risk involved in this dust was not so slight that it could be ignored, though it is conceded that the words "may be injurious" would not apply to negligible risks of injury. On the other hand, it is not legitimate to impose a higher standard than is actually required by the statute and to require the plaintiff to show that the dust was of a character which might "probably" or "possibly" be injurious. [Counsel referred to *Mist* v. *Toleman & Sons* [2] and to *Clifford* v. *Challen & Son Ld.*[3]]

It is further submitted that section 47 has not been complied with. Even if that section is directed primarily to prevention of injury by inhalation of noxious dust, the plaintiff can recover under that section if he suffers injury because the required steps were not taken, although the injury differs from that contemplated by the statute. That was shown by *Gorris* v. *Scott*,[4] and see also *Franklin* v. *Gramophone Co. Ld.*[5]

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[1] Factories Act, 1937, s. 4 (1): "Effective and suitable provision shall "be made for securing and maintaining by the circulation of fresh air "in each workroom the adequate "ventilation of the room, and for "rendering harmless, so far as practicable, all fumes, dust and other "impurities that may be injurious to "health generated in the course of "any process or work carried on in "the factory. (2) The Secretary of "State may, by regulations, prescribe "a standard of adequate ventilation "for factories or for any class or "description of factory or parts "thereof."

S. 42 (1): "There shall be provided "and maintained for the use of employed persons adequate and suitable "facilities for washing. . . . (2) The "Secretary of State may by regulations prescribe, either generally or as "respects any class or description of "factory . . . a standard of adequate "and suitable washing facilities."

S. 47: "In every factory in which, "in connexion with any process carried "on, there is given off any dust or "fume or other impurity of such a "character and to such extent as to "be likely to be injurious or offensive "to the persons employed, or any "substantial quantity of dust of any "kind, all practicable measures shall "be taken to protect the persons employed against inhalation of the dust "or fume or other impurity and to "prevent its accumulating in any "workroom, and in particular, where "the nature of the process makes it "practicable, exhaust appliances shall "be provided and maintained, as near "as possible to the point of origin of "the dust or fume or other impurity, "so as to prevent it entering the air "of any workroom."

[2] (1946) 62 T.L.R. 131; 44 L.G.R. 189.

[3] [1951] 1 K.B. 495.

Everett Q.C. for the defendants. The injury in this case was due, as McNair J. found, to a personal idiosyncrasy of the plaintiff to Monsonia wood dust. There was no reason why the defendants should have anticipated that danger, and McNair J. did not find as a fact that the dust was injurious. Therefore, section 4 of the Factories Act, 1937, does not apply, for in requiring occupiers to render harmless dust which may be injurious, the legislature has in mind persons of average susceptibilities, and an employer cannot be required to guard against an unusual risk arising from the weaknesses or idiosyncrasies of particular workmen. [He referred to *Paris* v. *Stepney Borough Council*[6] and *Bourhill* v. *Young*.[7]] Section 4 only requires that steps should be taken as far as is practicable. It is difficult to see how it could be practicable to guard against a risk which was not known to the employer to exist. [Counsel referred to *Smith* v. *Baveystock & Co. Ld.*[8]] Admittedly, section 4 is not directed only to dust which is "likely" to be injurious (as is section 47) but, having regard to the context, there must be some degree of risk; some likelihood that injury would result before the employer can be required to take steps. Further, the requirement that the dust must be rendered harmless would not be met by protective measures such as the provision of gloves, which do not affect the toxicity of the dust itself. Section 4 is a health and not a safety provision. It is directed to ventilation, and the steps to be taken to render the dust harmless are qualified by the words "by the circulation of fresh air." It was not practicable to "render harmless" this dust by ventilation. If section 4 is not confined to ventilation, it overlaps section 47, and, indeed, conflicts with it, for that provision requires the removal of dust which is "likely" to be injurious.

Section 47 does not apply here for it is directed to the prevention of injury by inhalation of dust, and not to dermatitis by contact with dust. In any case, the findings of fact by McNair J. that this dust was not likely to be injurious and was not given off in substantial quantities dispose of the claim under section 47. [Counsel referred to *Mist* v. *Toleman & Sons*[9] and *Gorris* v. *Scott*.[10]]

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[4] (1874) L.R. 9 Exch. 125.
[5] [1948] 1 K.B. 542.
[6] [1951] A.C. 367.
[7] [1943] A.C. 92.
[8] [1945] 1 All E.R. 531.

There is no specific provision against dermatitis in the Act, but that omission is deliberate, because it is preferable to leave the position flexible, giving the Secretary of State power to make regulations to deal with specific processes where experience shows that it is necessary to do so. Many special regulations have been made for the prevention of dermatitis in different trades. [He referred to regulations made under section 42 for the provision of washing facilities.] Section 60 also gives power to make regulations relating to dust causing bodily injury, and regulations dealing with dermatitis could be made under that section. Provision is therefore made for dealing with dermatitis by this dust, and if it had been thought, on the evidence of the reports of the Chief Inspector of Factories in 1935 and 1936, that there was a real risk of this wood causing injury, no doubt regulations would have been made. As, apparently, it was not thought necessary to do so, the employers cannot be held liable for not being aware that there might be some risk of injury. Finally, the action is misframed under section 4, because the appropriate proceeding under that section is a prosecution and not an action for damages. [He referred to *Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[11]]

Edgedale Q.C. in reply. With regard to the submission that the action is misframed, it is not helpful to consider an individual section of the Act and to see whether an action for damages arises under it. The Factories Act, 1937, was framed for the benefit of a class of persons and, if that class suffers any injury they have, or a particular member of the class who has suffered damage has a right of action for damages.

The plaintiff's right of action is under the Act, rather than under any regulations which might have been made by the Secretary of State under section 60. No regulations dealing with dermatitis have been made under that section and since section 4 deals adequately with the matter none is needed. The change of wording in section 4 from the comparable provision in the Act of 1901[12] is significant. It was intended to add a further requirement that the dust should be rendered harmless in cases where ventilation gave insufficient protection. The repetition of the word "for" gives that sense. The requirement is to render harmless as far as practicable by whatever means are effective.

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[9] 62 T.L.R. 131.

[10] L.R. 9 Exch. 125.

[11] [1923] 2 K.B. 832.

[12] Factory and Workshop Act, 1901,

That does not necessarily mean that the noxious dust must be turned into something which is innocuous, but it has to be made so that it will not be harmful. In *McCarthy* v. *Coldair Ld.*,[13] following *Callaghan* v. *Kidd*,[14] it was observed that the onus was on the defendant to show that it was not practicable to take any further steps. Here the defendants did nothing.

Section 47 is not limited to measures taken to prevent inhalation of dust. Finally, the defendants were in breach of the common law duty to take reasonable care not to expose their workman to unnecessary risks. The possibility that the plaintiff had a personal idiosyncrasy to this dust does not absolve them from liability, for they made no inquiries about the properties of the dust. If they had done so, they would probably have found out that it was dangerous.

Singleton L.J. [having stated the facts and referred to section 4 of the Factories Act, 1937, continued]:—Section 4 of the Act of 1937 is directed to ventilation. It must be contrasted with section 47 which specifies measures to be taken in certain circumstances to prevent inhalation of dust or fumes. The position of the words, "by the circulation of fresh air in each "workroom," admittedly, gives force to the contention made on behalf of the plaintiff workman that section 4 states two requirements: that provision must be made (a) for ventilation, and (b) for rendering harmless, so far as practicable, all fumes, dust, etc., that may be injurious to health. If this submission were adopted the plaintiff would be in a strong position, for the reports of the Chief Inspector of Factories for 1935 and 1936 show that the dust produced might be injurious to health, and, on the wording of section 4, it is immaterial whether the occupiers knew, or ought to have known, that the dust might be injurious to health. I am impressed by the fact that there is no known way of rendering the dust harmless except by ventilation; at least none was suggested to the court. Section 47 requires the provision of exhaust appliances, where the nature of the process makes it practicable. In the present case, exhaust appliances, even if practicable (and I do not think they would have been), would not be any help, for most of the dust is produced by sandpapering

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s. 1 (1): ". . . every factory . . . "(*d*) . . . must be ventilated in such "a manner as to render harmless, so "far as is practicable, all . . . , dust, "or other impurities generated in the "course of the manufacturing process ". . . carried on therein, that may be "injurious to health."

[13] [1951] 2 T.L.R. 1226; [1951] W.N. 590.

[14] [1944] K.B. 560.

the wood and rubbing the sandpaper. The only suggestion made by Mr. Edgedale as to suitable protective measures was that the workpeople could be provided with gloves and ointment. The absence of such provision might be relevant on the question of common law liability, but I do not regard such a measure as coming within section 4, nor would it be " rendering harmless " the dust within the meaning of the section. Dust is not rendered " harmless " by giving to the workmen ointment to put on their hands, or covers. That may give them protection, but it does not render the dust harmless. McNair J. found that effective and suitable provision was made for securing and maintaining adequate ventilation. He also found there had not been any complaint whatever with regard to ventilation. In my view, that finding disposes of the claim under section 4. Further, as there is no other known way of rendering harmless the dust, the words " so far as practicable " excuse the defendants.

No regulations have been made by the Secretary of State calling for the provision of ointment, or gloves, for this work. I cannot think that section 4 contains any such requirement. If employers do not take reasonable care to protect their employees against unnecessary risks, they are, of course, responsible in negligence for breach of their common law duty.

Section 47 of the Act deals with the removal of dust or fumes. [His Lordship read the section and continued:] That section is directed chiefly towards protecting persons employed against inhalation of dust, and from dust or fumes or other impurities of such a character and to such an extent as to be likely to be injurious. The provision of exhaust appliances is to remove the dust from the room in which people are working.

On this part of the case McNair J. said: " It seems to me " to be fully arguable that this section is primarily, if not wholly, " directed to measures of preventing the inhalation of dust, and " further, that the measures are only required to be taken, when, " in connexion with any process carried on in the factory, there " is given off, either (1) a dust which is likely to be injurious or " offensive to the persons employed in the factory, in the sense " of likely to be injurious according to the estimation of a reason-" ably well-informed factory occupier, or which the actual occupier " knew, or ought to have known, to be likely to be injurious; or " (2) dust present, of any kind, in substantial quantities. On the " facts proved before me, I do not find that dust from Monsonia " wood was, at the material time in either of the senses indicated, " likely to be injurious or offensive to the persons employed, or "that it was present in substantial quantities. It was only "created by sandpapering these pieces of wood, and it seems to "me that it is really an abuse of language to say that that simple "process would produce substantial quantities of dust within the "meaning of this section. The only time at which any substantial quantities of dust would be produced seems to me to be, "as demonstrated by one of the witnesses, when the pieces or "sheets of sandpaper were beaten together to clean them."

McNair J. added: "The evidence was conclusive that practical "mechanical exhaust appliances are never used in handfinishing "shops, and I was satisfied, on the evidence of the foreman, that "the operation in question, which sometimes involves the sandpapering of fillets of substantial length, could not, as a practical "matter, be carried on under a dust extractor."

It seems to me that, apart from anything else, the finding made by McNair J. that there was no dust of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, disposes of the claim under section 47, and I am inclined to think Mr. Edgedale assented to that view, though he submitted that the judge ought not upon the evidence to have found that there was no substantial accumulation of dust. The claim under section 42 was not pursued in this court.

[His Lordship then considered the common law claim, which does not call for report. He agreed with the finding of fact of McNair J. that: "On the facts, I am unable to find that on the "state of knowledge, as existing in 1950, there was any such "reasonable probability that exposures to Monsonia wood dust "would result in injury such as to lead a reasonable man placed "in the defendants' position to anticipate it."]

The appeal should be dismissed.

Denning L.J. I agree, and I only wish to add a few words on section 4. This case involves the usual contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation.

The evidence shows that dust from Monsonia wood "may be "injurious to health," and that no provision was made by the defendants for rendering it harmless. It was practicable for the defendants to do so by providing barrier cream and protective clothing, but they made no such provision.

In my opinion section 4 cannot be taken literally. It is directed to ventilation, and the governing words are "by the "circulation of fresh air," which must be read as governing both the first and second parts of the section. This view is supported by subsection (2), and also by the fact that any other view would render section 4 inconsistent with section 47, which deals with dust that is "likely to be injurious to health." It would be very strange if a person injured by dust, who could not succeed under section 47, because the dust was not "likely to be injurious," could nevertheless recover under section 4 on the ground that it "may be injurious." In my opinion, therefore, section 4 must be read as confined to defects of ventilation and it does not extend to description of protection in other respects.

In these circumstances, I need say nothing as to whether the provisions of section 4 and of the other sections in Part I of the Act give rise to a civil action for damages. The enforcement of these sections is expressly provided for by sections 8 and 9, and it may be, from their nature, that they were intended to be enforced by means of a prosecution and not by a civil action. The question, however, does not arise in this case, and I say no more about it.

I agree that the appeal should be dismissed.

Hodson L.J. The main question in this appeal is as to the construction of section 4 of the Factories Act, 1937. [His Lordship read the section and continued:] It will be observed that this section, in both its parts, is concerned with ventilation, and it is argued on behalf of the defendants that that is its sole topic, whereas the plaintiff contends that it is not so limited. Section 4 replaces and substantially reproduces section 1 (1) (*d*) of the Factory and Workshop Act, 1901. Clearly that subsection deals only with ventilation.

The plaintiff in this case was afflicted with dermatitis, caused, as McNair J. found, by dust from Monsonia wood, on which he was working whilst in the defendants' employment. His work involved sandpapering pieces of this wood, thus producing a fine dust, some of which settled on him.

The plaintiff alleged that, in breach of their statutory duty, the defendants made no effective or suitable provision for ventilating the workroom in which the plaintiff was employed, or for rendering harmless the injurious dust. Apart from ventilation, he contended that masks and some form of barrier cream ought to have been supplied for protective purposes. So far as ventilation is concerned, McNair J. found that effective and suitable provision was made in the workroom in question for securing and maintaining adequate ventilation. He further found that no process of circulation of fresh air would in any material degree have diminished the amount of injurious dust which fell on the plaintiff's hands, face and hair. He dealt with the alternative of rendering harmless by saying he considered it to be at least doubtful whether the expression "dust and other "impurities that may be injurious to health" included dust which the employers neither knew nor ought to have known to be injurious. He continued by saying that he was satisfied the defendants did not know, and still less ought to have known, of a dust which is only injurious to a person with the particular idiosyncrasy that had been ascribed to the plaintiff.

I do not think it is legitimate to import into the language of the statute words attributing knowledge, or a duty of knowledge, to the occupiers. The words "may be injurious" must be given their natural meaning, as opposed to "may possibly" or "may "probably," so that the duty to render harmless is here, prima facie, imposed on an occupier if section 4 applies at all.

The construction of section 4 of the Act of 1937 is by no means easy. There is force in the plaintiff's contention that, by altering the language of the Act of 1901, the legislature has imposed a duty separate from, and additional to, a duty to ventilate; that separate duty being added by the use of the words "and for rendering harmless" in the position which they now occupy. I am, however, of the opinion that, on its true construction, there is, in spite of the position of the words, no duty imposed by this particular section, apart from the duty of ventilation. This construction is, I think, supported by the consideration that the Act of 1937 is divided into parts, of which the first four deal with Health (General Provisions), Safety (General Provisions), Welfare (General Provisions), and Health, Safety and Welfare (Special Provisions and Regulations), section 4 being included in the part dealing with Health (General Provisions). Comparison of section 4 with the corresponding section 1 (1) (*d*) in the Act of 1901 leads to the same conclusion notwithstanding the change of wording. The provisions contained in section 4 (2) of the Act of 1937 for making regulations which prescribe a standard of adequate ventilation, point in the same direction, since no provision is made here for regulations which are designed to render harmless other than by ventilation. Moreover, it is exceedingly difficult to see how the subject-matter of the section could be rendered harmless by means other than ventilation, and I doubt whether any means such as those suggested by the plaintiff could be said to render it harmless. Accordingly, I read section 4 (1) as applying to ventilation only, and the words "and for rendering harmless" as meaning "and "for rendering harmless by the adequate ventilation which has "been mentioned."

Further, I agree with my Lord that the construction of section 47, in contrast with section 4, points very strongly in the same direction. The plaintiff also relied on section 47. That section deals with the provision of exhaust appliances for the purpose of throwing off dust, fumes or other impurities. In my opinion, there are several reasons why this section does not apply. It is directed to the protection of persons employed against inhalation. Further, McNair J. found that the evidence did not justify the conclusion that the dust in question was likely to be injurious, or, in the alternative, substantial in quantity, and I agree with that finding. The dust is not likely to be injurious except to a person with a particular idiosyncrasy of the kind mentioned by Dr. Ray Bettley, and the process of sandpapering pieces of wood would not, according to the ordinary use of language, produce substantial quantities of dust.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.; A. D. Vandamm & Co.*

E. D.

WESTWOOD *v.* CANN.

C. A.
1952
June 16, 17, 18; *July* 4.

Singleton, Denning and Romer L.JJ.

[1949 W. 2651.]

Plate—Gold and Silver manufactures—Wedding rings—Not hall-marked—Statutory standard of fineness—Acte for refourmacôn of abuses in Goldsmythes, 1576 (18 *Eliz.* 1, *c.* 15)—*Plate* (*Offences*) *Act*, 1738 (12 *Geo.* 2, *c.* 26), *ss.* 1, 5—*Gold Plate* (*Standard*) *Act*, 1798 (38 *Geo.* 3, *c.* 69), *ss* 2, 6—*Gold and Silver Wares Act*, 1854 (17 *&* 18 *Vict. c.* 96), *ss.* 1, 4—*Gold Wares* (*Standard of Fineness*) *Order*, 1932 (*S.R. & O.* 1932, *No.* 654).

A jeweller offered for sale in his shop 27 wedding rings described as being of "solid gold." None of the rings was hall-marked with

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the appropriate mark, as showing that the ring had been passed by an assay office, but each bore a numbered mark of fineness. The rings were seized by customs officers and, having been assayed, only six were found to be up to the standard marked on them, 17 (marked 9 carats) were between 8 and 9 carats, and two were less than 8 carats. An unmarked silver cigarette case was also taken and was found to be below the statutory standard of fineness for silver. The Assayer of the Guardians of the Standard of Wrought Plate in Birmingham brought an action against the jeweller because none of the rings, which were all made in the twentieth century, or the cigarette case (which was made since 1739) was hall-marked, and he obtained penalties in respect of the cigarette case and the six rings which were up to the standard marked on them, being above the minimum statutory standard for fineness of gold articles (9 carats). The claim in respect of the 21 other rings was dismissed on the ground that they were not manufactures of gold for the purposes of section 6 of the Gold Plate (Standard) Act, 1798, and did not, therefore, need to be hall-marked. On appeal as to these other rings:—

Held (by Singleton and Denning L.JJ., Romer L.J. dissenting) that each of the rings offended against section 6 of the Gold Plate (Standard) Act, 1798, for they were manufactures of gold which had not been duly hall-marked as required by that section. The section applied although the rings were less in fineness than the minimum statutory standard of 9 carats so that they could not be marked with a hall-mark of the assay officer.

The jeweller having died before the appeal was brought, the claim against him survived against his executors.

Attorney-General v. *Canter* [1939] 1 K.B. 318 applied.

Decision of Pritchard J. [1951] 1 K.B. 325 varied.

APPEAL from Pritchard J.[1]

On or about September 9, 1948, a jeweller, Samuel Cann, exposed for sale in his shop at 26 Moseley Street, Manchester, 27 wedding rings, which he described as being "solid gold." None of the rings was hall-marked with the appropriate mark, as showing that the ring had been passed by an assay office, though nearly all had a numbered mark of fineness, as being "18 ct.", "14 ct.", or "9 ct." On September 9, 1948, the rings and a silver cigarette case, which also was not marked, were taken by customs officers and sent to be assayed. Only six of the rings were found to be up to the standard marked on them, 17 of those marked "9 ct." were between 8 ct. and 9 ct., and two were just under 8 ct.

The plaintiff, as Assayer of the Guardians of the Standard of Wrought Plate in Birmingham, brought an action against the jeweller for penalties because none of the rings or the cigarette case was hall-marked.

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[1] [1951] 1 K.B. 325.

On November 3, 1950, Pritchard J. gave judgment for the plaintiff in respect of the cigarette case and the six rings which had been found to be up to or above the minimum statutory standard of fineness (9 ct.) and awarded penalties of £10 for the cigarette case and £50 in respect of each of the six rings. He disallowed the claim with regard to the rest of the rings, holding that no offence had been committed in offering these rings unmarked, for they were mere base metal for the purposes of section 6 of the Gold Plate (Standard) Act, 1798.[2]

The assay master appealed against the finding with regard to 21 rings which were not up to the standard of 9 ct., but, shortly after, the defendant died and the hearing of the appeal was delayed until his personal representatives were substituted as parties to the action.

H. I. Nelson Q.C. and *Wingate-Saul* for the plaintiff, the assay master. The 21 sub-standard rings are manufactures of gold for the purposes of section 6 (1) of the Gold Plate (Standard) Act, 1798, and a penalty of £50 has been incurred in respect of each of them. Although they could not lawfully be hall-marked because they are below the minimum statutory standard of fineness, they are not mere base metal. They were described on the show card as being "solid gold." It is submitted that offering for sale a spurious article is a more serious offence than merely failing to have an article which is up to standard marked with the appropriate mark, and since the preamble to Plate (Offences)

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[2] Gold Plate (Standard) Act, 1798, s. 1: ". . . it shall be lawful . . . to "work or make, or cause or procure "to be wrought or made, any gold "vessel, plate or manufacture of gold ". . . of the standard of 18 carats "of fine gold in every pound weight "troy."

S. 2: ". . . from and after the ". . . first day of October, 1798, no "person whatever shall sell, exchange, "or expose to sale, . . . or cause or "procure to be sold, exchanged, or "exposed to sale . . . any gold vessel, "plate, or manufacture of gold . . . "of the standard of 18 carats of fine "gold in every pound weight troy, "until such vessel, plate, or manufacture, shall be marked with the "new mark . . . upon pain that every "such person shall, for every such "offence, forfeit and pay the sum of "ten pounds."

S. 6: ". . . That if any person "shall, . . . work or make, or cause "or procure to be wrought or made, "or shall sell, exchange, or expose "to sale, . . . or cause or procure to "be sold, exchanged, or exposed to "sale . . . any gold vessel, plate, or "manufacture of gold, not being duly "marked with one of the marks by "law required, to denote one of the "respective standards of 22 or 18 "carats of fine gold in every pound "weight troy, every such person shall, "for every such offence, forfeit and "pay the sum of fifty pounds."

Act, 1738,[3] shows that the primary object of this legislation is to protect the public against fraud it is unlikely that the omission to mark a fine article would be heavily penalized whilst attempts to deceive the public by spurious gold should go unpunished. Section 6 of the Act of 1798 applies to any "manufacture of "gold." That may exclude articles which contain only an insignificant amount of gold but, subject to that possible exception, any manufacture containing gold is a "manufacture of "gold" for the purposes of the section, whether the gold content is such that the article could be hall-marked or not. If an article, sold without a hall-mark on it, is found to be substandard, a fine of £50 is imposed by section 6 and, in addition, the making of the article infringes section 1 of the Act of 1738, as amended by the Act of 1854 and Orders in Council made thereunder. The claim under section 1 has, however, been abandoned in this case. An article which is up to standard but is not hall-marked is within section 2 of the Act of 1798, imposing only a fine of £10, as well as section 6. Since the coming into force of the Common

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[3] Plate (Offences) Act, 1738, Preamble: ". . . but notwithstanding the "aforesaid several Acts of Parliament "and charters, great frauds are daily "committed in the manufacturing of "gold and silver wares, for want of "sufficient power effectually to prevent "the same. . . ."

S. 1: ". . . no goldsmith, silver- "smith, or other person whatsoever, "making, . . . or dealing in gold and "silver wares, within . . . England, "shall work or make, or cause or "procure to be wrought or made any "gold vessel, plate, or manufacture "of gold whatsoever, less in fineness "than 22 carracts of fine gold in every "pound weight troy."

S. 3: "If any shopkeeper, or other "person trading or dealing in gold ". . . wares . . . (not being the maker "or worker thereof) shall happen to ". . . sell, or expose to sale any gold ". . . wares worse than the respective "standards, and shall within 14 days "next after notice of the coarseness "thereof to him or her given, dis- "cover and make known to the party "aggrieved, or to the master, wardens "or clerk of any of the companies of "goldsmiths . . . the name and place "of abode of the maker or worker "thereof, or of the person . . . of "whom such shopkeeper . . . really "bought such coarse gold . . . wares ". . . so that he . . . may be . . . "prosecuted for the same; and if such "shopkeeper . . . shall, at any trial ". . . against such maker or worker ". . . give . . . material evidence . . . "and also that there did not on such "trial appear any ground to believe "that such shopkeeper . . . was con- "cerned in or privy to such fraud . . . "then . . . such shopkeeper . . . shall "be . . . exempted and discharged "from any penalty or forfeiture to be "incurred by this Act for . . . selling ". . . such coarse gold . . . wares . . . "and from any . . . prosecution for "the same. . . ."

S. 5: ". . . no goldsmith, silver- "smith, or other person whatsoever, "making or selling, trading or dealing "in, gold or silver wares, shall sell, "exchange, or expose to sale, within ". . . England . . . until such time "as such vessel, plate or manufac- "ture of gold (being of the standard "of 22 carracts of fine gold per pound "troy) . . . shall be marked as "followeth . . ."

Informers Act, 1951,[4] the difference in the fines is no longer of importance except where, as in this case, the offence was committed and the action brought before the passing of the Act.

Section 4 of the Gold and Silver Wares Act, 1854,[5] shows that the legislature contemplated that a standard of 8 carats would still be gold, for power was given to legalize the manufacture of articles of gold of any standard down to 8 carats. Although that power has not been exercised to the fullest extent and the minimum standard which has been legalized is 9 carats, it is submitted that a standard of 8 carats is within the contemplation of the legislature as gold. Consequently, articles made up to that standard are manufactures of gold, and not base metal, although they cannot lawfully be made or marked. The only decided case on this matter, *Buckley* v. *Alexander*,[6] is not in point, for there all the unmarked rings were found to be up to the legal standard of fineness. Finally, it is submitted that, applying *Attorney-General* v. *Canter*,[7] the liability of the jeweller survived in this case against his executors.

Wingate-Saul following. It is clear from section 1 of the Act of 1738 [8] that the expression "manufacture of gold" is not confined to articles of the statutory standard, for that section refers to "manufactures of gold . . . less in fineness" than 22 carats (which was the legal standard at that time). Pritchard J. seems to have been inconsistent in his judgment, for he awarded a penalty of £10 in respect of the silver cigarette case under section 1 of the Act of 1738, on the footing, apparently, that it was manufacture of silver, although it was not up to the statutory standard of fineness for silver, and, on his interpretation of the analogous expression "manufacture of gold" in section 6 of the Act of 1798, ought to have been treated as mere base metal.

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[4] Common Informers Act, 1951, s. 1 (3): "Where any person would, "but for subsection (1) of this section, "have been liable to a forfeiture or "penalty, he shall be liable on sum-"mary conviction to a fine not exceed-"ing one hundred pounds and, in "addition, to any non-pecuniary for-"feiture to which he would have been "liable as aforesaid:"

[5] Gold and Silver Wares Act, 1854, s. 1: "It shall be lawful for Her 'Majesty, by any order or orders to "be from time to time made by and "with the advice of her Privy Council, "to order that any gold vessel, plate, "or manufacture of gold may be "wrought of any standard not being "less than one-third part in the whole "of fine gold, to be declared in any "such order. . . ."

S. 4: "Nothing in this Act con-"tained shall be deemed or taken to "repeal the statutes now in force "relating to standards of gold wares, "or to the marks for denoting the "same, or any of such statutes, but "the same . . . shall continue . . . in ". . . force and effect . . . and shall "be construed with and as forming "part of this Act. . . ."

[6] (1889) reported in *Birmingham Post*, March 25 and 26, 1889.

[7] [1939] 1 K.B. 318.

[8] See note 3.

Blackledge Q.C. and *G. H. J. Bovell* for the personal representatives of the jeweller. Section 6 of the Act of 1798 is a penal section and, following the usual rule, should not be enforced against a citizen unless the meaning is clear beyond doubt. When the legislature intended to deal with substandard articles, it did so expressly and clearly, as in section 1 of the Act of 1738. Section 6 of the Act of 1798 is not concerned with articles of less than the statutory standard of fineness but only with articles of gold which can and should be hall-marked. A substandard article cannot lawfully be hall-marked, but it should not be assumed, in the absence of overwhelming persuasion, that the requirement that all manufactures of gold should be marked applies to something which it is impossible to mark, for in a penal section, such as this is, such a provision would have been made expressly and clearly. A person charged under section 1 of the Act of 1738 with making a substandard article is, in certain circumstances, afforded a defence by section 3 of the Act (both those sections being still in force). If the interpretation put on section 6 of the Act of 1798 by the plaintiff is correct it would seem that the seller of such an article might, nevertheless, be liable to the much heavier penalty of section 6 for failing to have the substandard article hall-marked, although he might be excused under section 3 of the Act of 1738 if he had done so innocently. Section 6 requires that a "manufacture of gold" should not be made or sold until it has been hall-marked, but if that requirement is read literally it is absurd, for an article cannot be hall-marked until it has first been made. Section 6 must, therefore, be given some meaning other than the apparent one if it is to make sense. It is noticeable that section 2 of the Act of 1798 does not refer to making, although section 5 of the earlier Act, to which section 2 corresponds in general terms, does deal with the making of gold articles. It seems probable, therefore, that section 6, which does refer to making, should be read as applying to a person who both makes and then utters the manufacture of gold, the section being intended to ensure that the manufacturer gets the article hall-marked. That interpretation avoids the difficulty inherent in the plaintiff's interpretation of section 6 which makes section 2 redundant. The heavy penalty of section 6 is then, as it should be, attracted by an act for which the maker is responsible, whereas if making and selling are separate offences, an innocent maker of a gold article for private use, which he had no intention of selling, might be penalized for something occurring afterwards over which he had no control. The section applies only to a person who makes, procures and afterwards sells a gold manufacture which is not hall-marked and does not apply to this jeweller.

These rings were legally base metal. "Base metal" is defined in section 14 of the Gold and Silver Wares Act, 1844,[9] for the purposes of that Act, but by section 4 of the Act of 1854[10] it was given a general application. [Counsel referred to de Castro on The Law and Practice of Hall-Marking Gold and Silver Wares, 2nd ed., p. 143, where a base metal is said to be "An alloy of gold being less than 9 carat gold."] As base metal these rings were outside the scope of section 6 and did not have to be hall-marked.

Nelson Q.C. in reply. Section 6 of the Act of 1798 does not require a mark to be put on an article which has been made contrary to law but stipulates that no "manufacture of gold" should be sold unless it has a mark on it. The vital question is what is a "manufacture of gold." A person who sold a substandard article between 1738 and 1798 would be liable to a penalty under both sections 1 and 5 of the Act of 1738. Under the Act of 1798 a penalty might be incurred under both sections 2 and 6 in respect of an article of 18 carats which was unmarked, and a person selling a substandard article after the Act of 1798 came into force could be prosecuted under section 6 of that Act and under sections 1 and 5 of the Act of 1738. Section 6 of the Act of 1798 is not directed to enforcing the statutory standards of fineness; it applies to any "manufacture of gold" irrespective of fineness, and it is not necessary to have the fineness accurately assayed in order to see whether the section applies. It is submitted that that is why it carries a heavier penalty than section 1 of the Act of 1738, for, whilst a person might easily infringe the fineness standard innocently, the absence of a hall-mark is patent to anyone who cares to look for it. It is submitted that the interpretation put on section 6 by the defendant is not correct, for it carries the absurd result that the maker of a spurious article escapes with, at most, a light penalty under section 1 of the Act of 1738 whilst the maker of a fine article who commits a purely technical offence in failing to have the article hall-marked is liable to a penalty of £50. The definition of "base metal" relied on by Mr. Blackledge is only for the purposes of the Act of 1844 and is not applied generally by the Act of 1854. [Counsel referred to *Young* v. *Cook*.[11]]

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[9] Gold and Silver Wares Act, 1844, s. 14: "For the better interpretation "of this Act . . . 'base metal' shall "mean any metal whatsoever other "than gold or silver of the respective "standards required by law; . . . and "the term 'ware' should mean and "include any plate, vessel, article or "manufacture of any metal whatso- "ever. . . ."

[10] See note 5.

Cur. adv. vult.

SINGLETON L.J. This appeal arises out of a claim to penalties made by the Assayer of the Guardians of the Standard of Wrought Plate in Birmingham against Mr. Samuel Cann, who was a jeweller in Manchester.

The claim was heard by Pritchard J. at Manchester in July, 1950, and on October 3, 1950, he gave judgment for the plaintiff for a part of the penalties claimed.

The plaintiff gave notice of appeal, and a cross-notice of appeal was served by the defendant. Soon after the hearing Mr. Cann died, and the hearing of the appeal was postponed until his personal representatives were substituted as parties to the action.

I propose, first, to refer to various statutes affecting the position. There was passed in the year 1576 an Act (18 Eliz. 1, c. 15), of which the title is: "An Acte for Refourmacôn of "Abuses in Goldsmythes," and it was enacted thereby that no goldsmith should work or sell goldsmiths' wares of gold less in fineness than of 22 carrotts, nor was any such ware to be put to sale before he "hath sett his owne marke to so muche thereof "as convenientlie may beare the same, upon payne to forfayte "the vallewe of the thinge so solde or exchaunged."

The Preamble to the Plate (Offences) Act, 1738, is instructive. It recites various Acts of Parliament, one of King Edward I, another of Henry VI, and one of Queen Elizabeth to which I have referred, and it refers to some of the difficulties which have existed, and the last few lines of the Preamble read: "but "notwithstanding the aforesaid several Acts of Parliament and "charters, great frauds are daily committed in the manufac"turing of gold and silver wares for want of sufficient power "effectually to prevent the same."

Section 1 of the Act of 1738 repeats in effect the provisions of the statute of Elizabeth I that "no goldsmith, silversmith, or

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[11] (1877) 3 Ex.D. 101, 105.

"other person whatsoever making, or dealing in gold and silver "wares within . . . England, shall work or make or cause or "procure to be wrought or made any gold vessel, plate, or "manufacture of gold whatsoever less in fineness than twenty-"two carracts of fine gold in every pound weight troy." The word "carracts" is spelt differently, and there are introduced the words "of fine gold in every pound weight troy." There was a penalty for breach of that of £10.

Section 5 provided that "no goldsmith, silversmith, or other "person whatsoever, making or selling, trading or dealing in gold "or silver wares, shall exchange, or expose to sale within . . . "England . . . until such time as such vessel, plate or manu-"facture of gold (being of the standard of 22 carracts of fine "gold per pound troy) . . . shall be marked" as set out. A breach of this entailed a penalty of £10.

This was a strengthening of the provisions of the Act of Elizabeth I, and it undoubtedly was intended to ensure, as far as possible, that the maker of every manufacture of gold should have it marked according to the statutory requirements before he sold it or exposed it to sale.

From the year 1576 it had been contrary to law to manufacture any plate or other goldsmiths' wares of gold less in fineness than 22 carats. From 1738 onwards no manufacture of gold could be exposed to sale by any goldsmith or person making, selling, or trading in gold until it had been duly marked without the incurring of a penalty.

The Gold Plate (Standard) Act, 1798, made it lawful for any goldsmith or other person making, trading or dealing in gold wares to work or make any manufacture of gold of the standard of 18 carats of fine gold in every pound weight troy.

Section 2 provided that no person should sell, or expose to sale, any manufacture of gold made after October 1, 1798, until such manufacture was marked with the new mark. There was a £10 penalty. This, again, was intended to ensure marking before any sale or dealing with the article took place, though on the wording of the section everyone who sold or exposed to sale a manufacture of the fineness of 18 carats before it was marked was liable to the penalty.

Section 6 is the section which gives rise to difficulty. [His Lordship read the section.]

It is submitted that, as nothing less than 18 carats could lawfully be made, the section could not apply to any manufacture of gold of less fineness than 18 carats. I do not take that

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view. I regard the section as an omnibus section which could be applied generally. The penalty under it is larger than that under section 2, and I cannot see why that should be so if it is only intended to cover cases which would fall under section 2; in other words, there would then be no need for both sections. It appears to me that the object of section 6 is to prevent any unmarked manufactures of gold getting on the market. It is not always easy to get things assayed, and thus the statute, by section 6, provides a penalty of £50 for exposing to sale any manufacture of gold not marked in the way that any manufacture authorized by law must be marked. In such a case all that need be proved is that the article is a manufacture of gold and that it was exposed to sale unmarked. No doubt if the article was 22 carat or 18 carat a penalty of £10 under the relevant sections of the Acts of 1738 and 1798 would be accepted. I see no reason why someone who sells, or exposes to sale, a manufacture of gold below the legal standard without a mark should escape section 6.

The Gold and Silver Wares Act, 1854, by section 1, enabled Her Majesty in Council to order that any gold vessel, plate or manufacture of gold might be wrought of any standard not being less than one-third part in the whole of fine gold, to be declared in any such order, and also to approve thereby of the instrument with which they should be marked or stamped, setting forth in figures the actual fineness thereof according to the standard so declared. Section 4 preserved the statutes in force relating to standard of gold wares and the marks for marking the same. The penalties were to remain in force, and the statutes were to be read and construed as forming part of the Act of 1854.

Two orders have been made under that Act, the first in 1854 and the second (which repealed the first) in 1932.[12] The order of 1932 provides that any gold vessel, plate or manufacture of gold may be wrought of either of the following standards; that is to say: (1) the standard of 585 parts of fine gold in every 1,000 parts by weight (hereinafter referred to as the standard of 14 carats); (2) the standard of 375 parts of fine gold in every 1,000 parts by weight (hereinafter referred to as the standard of 9 carats). Paragraph 4 of the order gave approval to the instruments for marking described and delineated in the schedule. As from the date on which the order came into force it has been lawful for any manufacture of gold to be wrought of the standard of 22, 18, 14 or 9 carats, but not of less fineness, though it is conceivable that an Order in Council might be made enabling any manufacture of gold to be wrought of the standard of 8 carats.

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[12] Gold Wares (Standard of Fineness) Order, 1932 (S.R. & O. 1932, No. 654): "(2) Any gold vessel, plate "or manufacture of gold may be "wrought of either of the following "standards . . . (i) . . . 14 carats "... (ii) . . . nine carats. (3) The "... Order in Council dated the "eleventh day of December, 1854, "shall as from October 1, 1932, cease "to have effect."

[His Lordship referred to the facts, read the statement of claim, and continued:] Pritchard J. found that the 27 rings were exposed to sale. He awarded a penalty of £50 each in respect of six rings, but held that no penalties were recoverable in respect of the other 21 rings, which, he said, were legally base metal.

The plaintiff appealed, contending that he is entitled to a penalty under section 6 of the Act of 1798 in respect of each of the 27 rings. In my opinion the appeal should be allowed. I do not think it can be right to describe the 21 rings as "legally "mere base metal." The results of the assay show that they were slightly below the 9 carat standard; two of them were a shade below what would have been an 8 carat standard if there had been one calculated in the same way.

The sole question for consideration is whether each of these rings was a manufacture of gold. There can, I think, be only one answer to that. They were advertised as "Solid gold "engraved and faceted wedding rings." They were (except as to two) of a fineness within the words "not being less than one-"third part in the whole of fine gold"; so that under section 1 of the Act of 1854 an Order in Council might have been made which would have allowed them to be manufactured in accordance with the law. The other two contained respectively 323·8 and 328·5 parts of fine gold in 1,000 parts. I do not see any reason why they should not be regarded in each case as a manufacture of gold. Indeed, they would be so treated for the purposes of the penalties under section 1 of the Act of 1738. I do not think that there is any dispute as to that.

There was also before the court of first instance a claim to penalties in respect of the 17 rings which were below the 9 carat standard. This claim was dropped for two reasons. One was that the notice of counsel who settled the statement of claim had not been drawn to the Order of 1932, and he had claimed under the repealed Order of 1854. An application to amend was made, but the terms as to costs on which it would have been allowed were not accepted by counsel for the plaintiff. It seems to me that the amendment would have been largely formal, for the provision as to the standard of 9 carat is the same in each case, except for the introduction of the words "in every pound weight "troy" in the Order of 1854; and the instrument for marking the standard of 9 carat is the same in each: "A die for stamping "the figure 9 and the decimal mark ·375."

The other reason for the dropping of this part of the claim was the inability of the witnesses to explain the expression used in the Acts of 1738 and 1798, and in the Order of 1854 "in "every pound weight troy."

I do not know the reason for the introduction into section 1 of the Act of 1738 of the words "in every pound weight troy." Pritchard J. said: ". . . in view of the evidence of Dr. Watson "and the plaintiff it seems possible that between 1854 and "1932 there has been a change in the methods used and the "terminology employed by those who carry on the profession of "assayers of gold, which has been reflected in the Order of 1932 "and with which for the sake of uniformity and simplicity the "language used to describe the standards of 22 and 18 carat "might well be amended."

I am not sure that this is a complete picture. The words "in "every pound weight troy" did not appear in the Statute of Elizabeth I, the material part of which is recited in the Preamble to the Act of 1738. Examination of the various Acts and Orders satisfies me that this is the position: Fine gold is 24 carats; 22 carats permitted by section 1 of the Act of 1738 is a manufacture of gold in which the proportion of gold is 22 parts of 24, and the 18 carats allowed by section 1 of the Act of 1798 is a manufacture of gold in which the proportion of gold is 18 parts of 24. This becomes abundantly clear when reference is made to the schedule to the now repealed Order of 1854 under which the instruments for marking are approved as follows: 15 carats ·625; 12 carats ·5; 9 carats ·375; and to the schedule under the Order of 1932 which is still in force: 14 carats ·585; 9 carats ·375. In each case the basis is that of fine gold, 24 carats, and the word "carat" is used from the time of Elizabeth I onwards as denoting a proportion of fine gold in the manufactured article; and if an Order should be made allowing manufacture down to one-third fineness, as is permissible under section 1 of the Act of 1854, the decimal mark would be ·333.

I have no doubt that the duties of those who have to deal with these matters would be simplified if the Acts and Orders were made the subject of a consolidating Act. At the same time

I cannot help feeling that the task of Pritchard J. would have been made lighter if those who conduct the affairs of the assayer had gone more fully into the matter.

In my judgment, the appeal should be allowed as to the 21 rings, and the amount of the judgment in favour of the plaintiff should be increased accordingly.

It is unnecessary for me to say anything as to the cross-appeal except that it must be dismissed.

DENNING L.J., after referring to the facts and to the claims made by the plaintiff, said:—The charge that the 17 rings were below standard fineness failed. The reason was because the experts did not understand the meaning of the standard of fineness laid down in an Order in Council in 1854. That Order said that the minimum standard of fineness was "9 carats of fine "gold in every pound weight troy." The experts could not explain that phrase. They said that a carat was not a weight but a proportion, and that there was no such thing as a pound weight troy. It is a pity that the learning on this subject should have so quickly been forgotten. With only a little research I have discovered that the troy pound was the "original and "genuine standard measure of weight" in this country; and a brass weight made in 1758 was kept at Westminster to denote that standard until it was damaged in the fire of 1834. The troy pound was a recognized standard until 1878, when it gave place to the pound avoirdupois. The experts were right in saying that a carat is, properly speaking, a proportional measure; it is one-twenty-fourth part of a whole. Whatever the whole is, a carat is one twenty-fourth of it. This word "carat" is of very ancient origin and came to us from lands over the seas. It is derived from the Arabic "Kirat" and is still much used in the Sudan to denote one-twenty-fourth. Nowadays, in England, in connexion with gold, it is used in its proper sense to denote only a proportion; for example, when an article (of any weight) out of every 24 parts contains 22 parts of fine gold and two of alloy, it is said to be gold of 22 carats. But 200 or 300 years ago, the word "carat" was often used in England to denote a definite weight, namely, one-twenty-fourth of a pound troy of gold. Thus the Oxford English Dictionary quotes a work of 1667 as saying: "The pound "weight or 12 ounces troy of gold is divided into 24 parts which "are called carrats, so that each carrat is 10 pennyweight troy or "half an ounce." It is in that sense that the word "carat" is used in the Acts of 1738 and 1798 and the Order in Council of 1854. Once this is understood the standard laid down in those Acts and in the Order becomes perfectly clear. The old standard of "9 carats of fine gold in every pound weight troy" is the same as the modern standard of "9 carats," the only difference being that in the old phrase "carat" is used to denote a weight, and in the modern one a proportion. The standard of 9 carats means that, in every 24 parts, 9 parts are of fine gold and 15 parts of other metal.

I need say no more about the charge of lack of fineness. It was dropped because the experts did not know the history of their subject; and it has not been revived before us. We are only concerned with the charge of exposing the 27 wedding rings for sale without a hall-mark. On this subject I do not propose to go through the sections of the Acts in detail, but only to state their effect in the simplest terms in relation to articles made in modern times.

Every article which is a "manufacture of gold" and is made in England must, in order to be lawful, be one of the specified standards; that is, it must contain at least 22 carats, 18 carats, 14 carats or 9 carats of fine gold. As soon as the article is made, it must be taken to the assay office to be assayed and marked. It is usually taken to the office whilst it is still in the rough before being polished and finished. If it is found to be up to standard it will then be marked with the appropriate hall-mark to show it has been assayed, such as a leopard's head for the London office and an anchor for the Birmingham office; and also with a mark to denote its fineness, that is, a crown on 22 carat and 18 carat, and special numbering on 14 and 9 carat; but if it is not up to standard it is cut and battered and sent back defaced to the maker. So also with articles that are imported into England. If they are made of gold and are intended to be sold, they must be up to our standard and assayed and marked with a hall-mark before they are sold.

Such being the duty laid upon the maker or importer, it is plain that every article which is made of gold should have upon it a hall-mark. If it has no hall-mark, there must be something wrong with it; either it has not been taken to the assay office to be marked, as it should have been, or it has been taken there and rejected as not being up to standard. In any case, if it is not hall-marked, the probability is that it is below standard, because no maker or importer is likely to omit to get it marked if it is up to standard. The hall-mark is for the ordinary man at once the test and the proof that it is up to standard. So it should be also for the jeweller. He cannot be expected himself to assay every gold article in his shop to see that it is up to standard, but he can at least see that it has a proper hall-mark. If it is properly hall-marked, he can safely sell it as being made of gold; but if it has no hall-mark, or no proper hall-mark, he cannot do so.

The Acts bear out what I have said. They show that, so far as the retailer is concerned, the critical question is whether he is exposing for sale an article which is a "manufacture of gold" without a hall-mark on it. If it is a manufacture of gold and has no hall-mark, he is guilty of an offence under section 6 of the Act of 1798, as amended by section 4 of the Act of 1854. It is no defence for him to say that it is up to standard. A fortiori, it is no defence for him to say it is below standard. The fact that it is below standard is an offence under section 1 of the Act of 1738, as amended by the Act of 1854, but that does not mean that the absence of a hall-mark is not also an offence. I find no difficulty about section 2 of the Act of 1798. That covers cases where a maker or importer sells or exposes for sale a gold article before it is marked. The fact that such cases might also be brought under section 6 does not mean that section 6 is to be read in a restricted sense.

If this interpretation of the Acts is correct, the only question in this case is whether the 27 wedding rings were "manufactures "of gold"; for if they were, they ought to have been hall-marked. Pritchard J. has held that if they were up to standard fineness they were manufactures of gold; but if they were below standard they were legally mere base metal. The result was that, in regard to the six of them which were up to standard, he imposed a penalty on the jeweller of £50 for each of those six rings; but in regard to the 21 which were a little below standard he imposed no penalty at all. I cannot agree with an interpretation which leads to such an odd result. The oddity is not to be explained by saying that the jeweller should have been found guilty of lack of fineness in those 21. Lack of fineness would have only carried a penalty of £10. We should, therefore, still get the odd result that the wedding rings which were up to standard but not hall-marked would carry a penalty of £50 each, whereas those which were below standard and not hall-marked—a much more serious offence—would only carry a penalty of £10 each. I prefer to give the Acts an interpretation which avoids such a result.

The true position is, I think, this: An article is a "manufacture of gold" within the Acts if fine gold has been used in the manufacture of it, even though the proportion of fine gold is considerably less than the minimum standard of 9 carats. Even if there is only a small proportion of fine gold, say 6, 7 or 8 carats, nevertheless it is a "manufacture of gold," and anyone who exposes it for sale is guilty of offences against the Acts. He is guilty of selling a gold article below the minimum fineness, and also of selling it without a hall-mark. The two offences are not alternative. They are concurrent. Before the Common Informers Act, 1951, the offender would be liable in an action to a penalty of £10 on the one and £50 on the other. In future, he will be liable on summary conviction of each offence to a penalty not exceeding £100.

A question was raised before us whether rolled gold is a "manufacture of gold." It is made by means of a very thin film of 9 carat gold being rolled on top of a base metal. It is not treated by the assay offices as being a manufacture of gold. The reason is, I expect, because the amount of fine gold in the finished article is so negligible that it cannot be considered to be a "manufacture of gold." Whatever be the correct position of "rolled gold," however, I am clearly of opinion that these wedding rings (which were described as solid gold) were in fact "manufactures of gold" and should have been hall-marked. It is no answer to say they had so little gold in them that they could not be hall-marked. If they had less than 9 carats, they ought not to have been made at all, and ought not to have been described as gold. I realize, of course, that the material question is not whether they were described as "gold," but whether they were in fact "manufactures of gold"; but if a retailer describes them as "gold," it is strong evidence against him that they contain sufficient fine gold to be "manufactures of gold." So long as they contained an amount which was not merely negligible they were "manufactures of gold," and ought to have been hall-marked. The amount in these 27 rings was not negligible. It was at least 7 or 8 carats. They were, therefore, "manufactures of gold," and the jeweller who exposed them for sale is, in my opinion, liable to a penalty of £50 on each of the 27 rings because they were not hall-marked. He has since died, but the liability survives against his executors. (See *Attorney-General* v. *Canter*.[13])

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[13] [1939] 1 K.B. 318.

In parting with this case, I would observe that in 1856 and 1879 Select Committees said that the law as to hall-marking was uncertain owing to the number of statutes in which it was to be found; and they expressed the opinion that the consolidation and amendment of the law should be carried out without further delay. Now, 73 years later, in 1952, I may, perhaps, be permitted to express the same opinion.

I agree with my Lord that the appeal should be allowed.

Romer L.J. It is with regret that I find myself unable to share the view which my brethren have expressed to the effect that the plaintiff is entitled to penalties in respect of each of the 27 rings which are the subject of these proceedings. In the court below, the plaintiff was awarded penalties on only six of the rings and failed with regard to the other 21. In my judgment, Pritchard J. was right in so deciding, and this appeal should accordingly be dismissed.

The essential question for determination, as it seems to me, is whether the 21 wedding rings in question fell within the description of "manufacture of gold" as that phrase is used in section 6 of the Gold Plate (Standard) Act, 1798. If they did, then the appeal must succeed because the rings were admittedly exposed to sale by the defendant and were not marked with either of the hall-marks referred to in that section. If, on the other hand, none of the rings constituted a "manufacture of "gold" for the purposes of the section, then the appeal must necessarily fail.

In order to arrive at a conclusion on this question it is necessary, I think, to consider first the effect of the Plate (Offences) Act, 1738. As appears from the preamble to that statute, Parliament had been concerned as far back as the reign of Edward I with the problem of preserving the purity of gold and silver wares made and sold in this country. In spite of the various legislative efforts which had been made to achieve this object, the position remained unsatisfactory, as appears from the recital in the Act of 1738 that "notwithstanding the aforesaid "several Acts of Parliament and Charters, great frauds are daily "committed in the manufacturing of gold and silver wares for "want of sufficient power effectually to prevent the same." So far as the manufacture and sale of gold wares were concerned, the object of the Act of 1738 was, first, to ensure the fineness of the gold from which such articles should be wrought, and, secondly, to insist upon such articles being subjected to a compulsory assay before they were sold or offered for sale.

Section 1 of the Act was directed to the first of these objects. By a statute of Elizabeth I [14] it had been enacted "that no gold-"smythe from the 20th daye of April nexte cominge, shall work "sell exchaunge or cause to be wroughte solde or exchaunged any "plate or other goldsmythes wares of golde lesse in fynesse than "that of XXII carrotts." Section 1 of the Act of 1738 appears to have preserved this standard, although it did so in language which is now obsolete and perplexed the experts who gave evidence before Pritchard J. Having laid down the requisite standard of fineness which was to be observed ("22 carracts of fine gold in "every pound weight troy") the section then proceeded to impose penalties on persons who disregarded it. Section 3 conditionally mitigated these penalties in the case of persons who innocently sold or exposed for sale gold wares which fell below the prescribed standard of fineness.

The legislature then turned its attention to the second of the objects which I have mentioned and made hall-marks (as they are called nowadays) compulsory. There was nothing new in this, for the marking of gold wares had already been provided for by earlier statutes, but the system then current was, I suppose, regarded by the legislature as insufficient or inadequate. The matter was accordingly dealt with in some detail by section 5 of the Act of 1738, which, so far as material for present purposes, enacted as follows: "And from and after the 28th May, 1739, "no goldsmith, silversmith, or other person whatsoever, making "or selling, trading or dealing in, gold . . . wares, shall sell, "exchange, or expose to sale, within England any gold . . . "vessel, plate or manufacture of gold . . . whatsoever made after "the 28th May, 1739, . . . until such time as such vessel, plate "or manufacture of gold (being of the standard of 22 carracts of "fine gold per pound troy) . . . shall be marked as followeth"; details of some complexity are then prescribed for the marking of these wares and, at the end of the section, the same penalties are imposed for breaches of its provisions as those imposed for breach of section 1. On the language which I have quoted, it seems reasonably clear, as I think, that this compulsory marking was confined to such articles of gold as conformed, in their material, to the standard of fineness which had been laid down by section 1 of the Act. It was suggested in argument before us on behalf of the appellant that this is not the proper interpretation of section 5, and that the section was prohibiting the sale of unmarked gold wares even if they were below the requisite standard of fineness. I cannot, however, accept that contention, if only for the reason that it, in effect, strikes out of the section the parenthesis "being "of the standard of 22 carracts of fine gold per pound troy." It does not appear to me that any effect is given to those words if the operation of section 5 is extended to gold articles which were of 21 carats or less.

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[14] 18 Eliz. 1, c. 15.

The Act of 1738 remained in force until the Act of 1798 was passed, and during the intervening 60 years the position would appear to have been as follows. Any person who made or sold gold wares of 21 carats or less committed no offence under section 1 of the Act of 1738; if, however, he sold such wares, or offered them for sale, unmarked, he committed an offence under section 5 of the Act, whatever other offence (if any) he might have been guilty of in so doing. On the other hand, if a person made or sold a 22 carat article, there was no infringement of section 1, but he could be proceeded against under section 5 if he sold it or offered it for sale without first having it marked with the appropriate device.

That being the position, it is next necessary to consider some of the provisions of the Act of 1798. This statute, by section 1, reduced the permissible standard of fineness for gold wares from 22 carats of fine gold in every pound weight troy to 18, and, by section 2, provided that no person should sell or offer for sale any gold vessel plate or manufacture of gold made after October 1, 1798, of the new standard until it should be marked with the new mark therein designated; and a penalty of £10 was imposed for breach of this requirement. Some importance was attached to section 2, and I will return to it later. Sections 4 and 5 preserved the previously existing right to manufacture and sell gold of 22 carats and also the mark which, under the Act of 1738, had been prescribed for gold of that standard. Then comes the important section 6. [His Lordship read it.]

It is clear that, after the passing of this Act, anyone who made or sold an article of gold of 17 carats or less would be committing an offence against section 1 of the Act of 1738, and would incur the penalty of £10 thereby imposed. The question is whether, if he sold such an article which did not bear either the 22 carat or the 18 carat hall-mark, he would also incur the £50 penalty imposed by section 6 of the Act of 1798. This is the real issue

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in the present appeal, but, before considering it further, it would be convenient to notice briefly some of the subsequent legislation. By section 7 of the Gold and Silver Wares Act, 1844, penalties were imposed on assayers employed by the companies therein mentioned who should "mark . . . any ware of base metal with "any die or other instrument used or to be used by any such "company for marking gold or silver wares to denote that the "same is of the standard allowed and required by law"; and by section 14 it was provided that the term "base metal" in the Act should mean any metal whatsoever other than gold or silver of the respective standards required by law and the term "ware" should mean and include any plate, vessel, article or manufacture whatsoever. The Gold and Silver Wares Act, 1854, empowered Her Majesty by Order in Council to order that any gold vessel, plate or manufacture of gold might be wrought of any standard not being less than one-third part in the whole of fine gold, to be declared in such Order, and to approve (in effect) new hall-marks as therein mentioned for the same. Section 4 of the Act in substance preserved the existing statutory provisions relating to standards of gold wares, and the marks for denoting the same, and to prohibitions, penalties and forfeitures. By Order in Council, made under the powers conferred by the Act of 1854, Her Majesty authorized three further standards of fineness, that is, 15 carats, 12 carats and 9 carats, and approved a hall-mark for each of those standards respectively. This Order was revoked by the Gold Wares (Standard of Fineness) Order, 1932, which instead authorized standards of fineness of 14 carats and 9 carats, respectively, and devices to be used on gold wares made in conformity with those standards.

Returning now to the Act of 1798, considerable discussion took place during the argument with regard to section 2. For myself I do not think that it has any real relevance to the present problem. Neither goldsmiths, nor the British public generally, had, when the Act was passed, any acquaintance with or experience of gold wares in this country conforming to any standard of fineness other than that of 22 carats, and it was obviously of the highest importance that articles made in accordance with the new standard of 18 carats should be plainly and readily distinguishable from the old. The leading characteristic of the 22 carat hall-mark was a lion passant, and section 2 provided that, instead of that device, the mark of a crown and the figures 18 should be stamped upon all gold wares of the new standard authorized by the Act. A reference to section 5 of the Act of 1738 shows that the hall-marks therein provided for included indications as to the origin and maker of the wares as well as the lion passant device. No mention is made of these in section 2 of the Act of 1798; and, as I have said, in my opinion, the object, and the sole object, of that section was to ensure that the principal feature of articles made to the new and lower standard of fineness should be readily distinguishable from that to which the English people had become accustomed. As the result of section 2, anyone who thereafter sold or offered for sale any article of gold of 18 carats which did not bear upon it the mark of a crown and the figures 18 would be subject to the same penalty as a person who sold or offered for sale a 22 carat article which had not upon it the imprint of a lion passant.

Section 6 of the Act of 1798 was, in my judgment, again directed to the question of hall-marking, but from a wider aspect. Whether or not gold wares of 17 carats or less came within its scope, it is quite clear that the section operated on articles both of 22 carats and of 18 carats, and also, I think, on any articles that might fall within those two standards. What, then, was the effect of the section on gold wares of 22 carats? It was already an offence (under section 5 of the Act of 1738) to sell such wares unless they bore the marks therein laid down. The penalty imposed by that section, however, was only £10, and the only reasonable effect that can be attributed to section 6 of the Act of 1798, in my opinion, in relation to articles of 22 carats, was to increase that penalty to £50. The requirements of section 5 of the Act of 1738 continued in force and were neither diminished, increased or altered in any way, but the penalty for disregarding them was made more severe. As to articles of the new 18 carat standard, section 2, which I have already considered, altered the principal feature of the hall-mark of 1738, but was not dealing with, and made no reference to, the subsidiary characteristics of such mark (for example, indications of origin). The comprehensive object of section 6, as I think, was to compel the use of the complete hall-mark (including these minor features) on articles of 18 carat and, indeed, on articles of a greater fineness up to and including those of the 22 carat standard. In other words, it was the object of the legislature to ensure the continuance of a requirement which had existed for centuries, namely, the due marking of authorized manufactures of gold; and (because, presumably, a disregard of the requirement had become too prevalent) to increase beyond any previous level the penalties for its non-observance.

Although, in the ways which I have indicated, it would seem that full effect is given to section 6, it is contended on behalf of the appellant that the operation of the section is not exhausted by applying its provisions to wares of authorized standards of fineness, but that any article made or sold after the passing of the Act of 1798 which contained any gold ingredient, however minute, came within its scope. This argument is founded primarily on the suggestion that the phrase "manufacture of gold" may properly include, and does in section 6 include, wares of unauthorized as well as of authorized fineness. Then, following on this contention, it is suggested that it would be absurd to suppose that a person who sold an unmarked and unauthorized article should escape the penalty imposed by section 6, whilst a person who sold an unmarked article of a legitimate standard of fineness should be penalized under the section. I will deal first with this latter suggestion to which, in my opinion, there is more than one sufficient answer. In the first place, a person who sold unmarked an article which was below the requisite standard of fineness would not escape unscathed, for he would be committing an offence against section 1 of the Act of 1738. It is true that the penalty under that section is lighter than that under section 6 of the Act of 1798, but it is not difficult to think of an explanation of that; for example, the difficulty of assessing the degree of fineness in articles which a goldsmith sold might well result in his infringing section 1 of the Act of 1738 without knowing that he was doing so, but the fact that an article which he was offering for sale had no hall-mark on it was plain for him to see. In the second place, the absurdity suggested had undoubtedly existed for 60 years, if I am right in my view that section 5 of the Act of 1738 was confined in its operation to gold wares which conformed to the authorized standard. And, further on this aspect of the matter, if it had been the intention of the legislature, in enacting section 6 of the Act of 1798, to render illegal that which, so far as I am aware, had never been illegal before, one would have expected it to do so in language that was reasonably precise. Then, as to the phrase "manufacture of gold" in section 6 of the Act of 1798, it is true that in the various Acts the legislature recognized that articles might be described or regarded as gold wares even if they did not conform to the requisite standard of fineness: see, for example, section 3 of the Act of 1738. But I venture to think that the phrase, prima facie, is referable only to gold of legal fineness and does not also include that which was defined in the Gold and Silver Wares Act, 1844, as "base metal." This prima facie impression is strongly reinforced by other considerations arising from section 6 itself. The object of the section was to prohibit the sale of unmarked gold. I myself should have thought that the legislature had in mind gold that it was lawful to sell, and not gold that it was unlawful to sell, and that it would be unlikely to comprehend legal and illegal goods in this connexion in one and the same phrase. The matter, however, does not rest there. It is unlikely that the legislature would impose a heavy penalty on a person for failing to do that which it was illegal for him to do. It is unlikely that the legislature intended that a man, who was already liable to a penalty under section 1 of the Act of 1738, should incur further liability under section 6 of the Act of 1798 if he sold an illegal object unmarked, but should escape such liability if he, fraudulently, had the article marked—which could, presumably, only be done with the connivance of some assayer. Then, again, if "manufacture of gold" includes gold wares of less than the authorized standard of fineness, does it include all articles which contain any element of gold, however minute in proportion that element may be? The appellant answers, and logically, as it seems to me, must answer, "Yes." If this be right, it seems probable that every shopkeeper in England who deals in the cheaper kind of jewellery is innocently breaking the law. Every such shopkeeper, for instance, who sells "rolled "gold" articles (which we were told consist of metal overlaid with a very thin covering or skin of gold) is committing an offence in selling them without a hall-mark—though he could not by any legitimate means get an assayer to mark them. We were informed that in fact no proceedings have ever been taken in such cases, but, if the appellant assayer here is right, there would be no defence if such proceedings were brought. It was suggested alternatively that even if "rolled gold" or other metal containing some small proportion of gold could not properly be regarded as "manufacture of gold," nevertheless the rings here in question should be so regarded because they are all of 8 carats or thereabouts, which is a standard of fineness envisaged by the Gold and Silver Wares Act, 1854. I cannot agree to this suggestion. Although this Act enabled the Sovereign, by Order in Council, to authorize this standard of fineness, no Order to this effect has ever been made; with the result that an article of 8 carats, if made or sold, would be just as illegal under section 1 of the Act of 1738 as an article of 7 or less. For my part, unless the phrase "manufacture of gold" is to be confined to wares of the authorized standard (which furnishes a clear and definite criterion), I do not know at what point between that and the lowest possible standard it is permissible to stop.

It has been pointed out that the defendant described the rings in question as "solid gold." So he did, but I venture to think that the description under which the rings were sold is not germane to the issues which are now before the court—however relevant it would have been if an action had been brought by a purchaser and founded on misrepresentation.

For the reasons which I have indicated, I am unable to accept either of the plaintiff's arguments, based respectively on the meaning of the phrase "manufacture of gold" and on the absurdity of the results deriving from upholding the decision of Pritchard J. In my judgment, the legislation on this subject has resulted in the following code: (i) a person who sells a gold article of less fineness than the minimum authorized standard (at present 9 carats) offends against section 1 of the Act of 1738; (ii) a person who sells such an article without a hall-mark does not offend against section 6 of the Act of 1798—whatever other offence (if any) he might commit by so doing; (iii) a person who sells an article which, while conforming to an authorized standard of fineness, does not bear the hall-mark appropriate thereto commits an offence against section 6 of the Act of 1798, but does not, of course, infringe section 1 of the Act of 1738. An example of this kind of case was *Buckley* v. *Alexander*.[15]

This, in my opinion, is the effect of the various statutes and orders which were brought to our attention, and, for the reasons which I have above expressed, the decision of Pritchard J. on the point now before us was, in my judgment, right, and this appeal should be dismissed. As, however, my brethren take a different view, the appeal will be allowed.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham; J. H. Milner & Son, for Leslie M. Lever & Co., Manchester.*

E. D.

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[15] Reported in the *Birmingham Post*, March 25 and 26, 1889.

REGINA *v.* STRAFFEN.

C. C. A.

1952
Aug. 20.

Slade, Devlin and Gorman JJ.

Criminal Law—Murder—Plea of not guilty—Evidence of other murders committed by accused—Similarity of circumstances and methods—Evidence admissible to establish identity—Oral statements to police by Broadmoor patient—No caution given before statement—Admissibility—Judges' Rules.

Where a person charged with an offence enters a general plea of not guilty to the charge, such plea involves an issue of identity and evidence is accordingly admissible of other offences previously committed by the accused which, from the similarities between the circumstances in which they were committed and the method employed in their commission and those of the offence with which the accused is then charged, tend to establish that they were committed by the same individual.

Non-compliance with the provision in the Judges' Rules that a person in custody against whom the police intend to prefer a charge, must receive a caution before being allowed to answer questions put to him, does not necessarily render the answer to those questions inadmissible in evidence on the trial of the accused: it is a matter for the discretion of the trial judge in each case whether the answers should be admitted or not.

APPEAL against conviction.

In 1951, the appellant, John Thomas Straffen, was charged with the murder, by manual strangulation, of two little girls at Bath on July 15 and August 8 respectively. He was found unfit to plead by reason of insanity and was committed to Broadmoor Institution. On April 29, 1952, he escaped from Broadmoor and was at large from 2.40 p.m. until 6.40 p.m. of that day, when he was arrested and returned to Broadmoor. At about 6 a.m. on the following morning the body of Linda Bowyer, the subject of the present charge, was found in the village of Little Farley, Berkshire, and her bicycle was found some two hundred yards away. She had died from manual strangulation some 12 to 15 hours before. About two and a half hours after the discovery of the dead body of the child, two detective officers visited the appellant at Broadmoor. They said that they would like to talk to him about his escape on the previous day, and asked him if he was prepared to make a statement regarding his movements. No caution, as required by the Judges' Rules in the case of a person in custody, was given to the appellant before being questioned by the police officers. He denied that he had murdered the child, though he admitted that he had been in the neighbourhood of the place where her body was found and that he had seen her.

He also admitted that he had killed the two girls at Bath in the preceding year. At the trial Cassels J., after hearing legal argument in the absence of the jury, admitted evidence of the oral statements made by the appellant to the police officers and also the evidence of the doctor who was called as a witness in connexion with the murders at Bath and of a pathologist who was tendered as a witness in the present case and who had studied the depositions, the photographs and the post-mortem reports in the Bath cases. The evidence was tendered to prove the similarities between the circumstances of the three cases and the method employed by the murderer in each. Those similarities were stated to be (1) that in each case the victim was a young girl; (2) that each of the children was killed by manual strangulation; (3) that in no case was there any attempt at sexual interference or any apparent motive for the crime; (4) that in none of the cases was there any evidence of a struggle; and (5) that in no case was any attempt made to conceal the body although that could easily have been done.

Cassels J. admitted the evidence tendered on the ground that it was material to establish the identity of the murderer in the case before him. With regard to the statements made by the appellant to the detective officers, he expressed the view that the words "in custody" in the Judges' Rules meant in custody of the police and did not apply to a Broadmoor patient.

In his notice of appeal the appellant alleged that Cassels J. was wrong in law (1) in admitting evidence of the murders alleged to have been committed by the appellant at Bath on July 15 and August 8, 1951, and (2) in admitting evidence of the oral statements made by the appellant to the police officers on April 30, 1952, while he was in custody, without the usual caution having been first administered.

Henry Elam and *Hugh Park* for the appellant. Cassels J. was wrong in admitting evidence of the murders which had been committed at Bath in the previous year. The general principle, as stated by Lord Herschell in *Makin* v. *Attorney-General for New South Wales* [1] is that evidence is not admissible which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that he is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried, but such evidence may be admitted if it is relevant to an issue before the jury. In order to be admissible, the evidence must fall into one of a number of specified categories, of which examples may be found in the following cases: *Rex* v. *John Bond*,[2] *Rex* v. *Ball*,[3] *Rex* v. *Boyle and Merchant*,[4] *Rex* v. *Armstrong*,[5] *Rex* v. *Mortimer*,[6] *Rex* v. *Rodley*,[7] *Thompson* v. *The King*,[8] and *Harris* v. *Director of Public Prosecutions*.[9]

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[1] [1894] A.C. 57.

In the present case the evidence was admitted on the ground that it tended to establish the identity of the appellant as the murderer of Linda Bowyer. The issue of identity is one of the categories in relation to which evidence of previous offences is admissible, and it is conceded that if the evidence of the previous murders was directed to that issue, it might and probably would be admissible. It is submitted, however, that in the present case the evidence relied on did not go to that issue at all. When the accused said that he did not kill the child, and pleaded not guilty at his trial, the defence set up was a complete denial, and not one of mistaken identity, and that being so, the evidence of previous offences was not admissible. As to what constitutes identity, see *Thompson* v. *The King*,[10] *Perkins* v. *Jeffery*,[11] and *Rex* v. *Hall*.[12]

Further, even if the evidence was technically admissible, if its prejudicial value against the accused outweighed its evidential value, the trial judge had an overriding discretion to exclude it. It is not, however, contended that in the present case, if the evidence was admissible, the judge's discretion was not judicially exercised.

With regard to the second ground of appeal, Cassels J. ruled that the Judges' Rules did not apply in the case of a person detained in Broadmoor since he was not "in custody," and that the police officers who questioned the appellant were under no duty to caution him before allowing him to answer questions. It is submitted that a person detained in Broadmoor is just as much in custody as if he were in prison, and that as the customary caution was not given, the oral statements made to the police officers by the appellant should not have been admitted in evidence.

Sir R. Manningham-Buller S.-G., *G. D. Roberts Q.C.* and *J. N. Hutchinson* for the Crown were not called on to argue.

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[2] [1906] 2 K.B. 389.
[3] [1911] A.C. 47.
[4] (1914) 10 Cr.App.R. 180, 193.
[5] [1922] 2 K.B. 555.
[6] (1936) 25 Cr.App.R. 150.
[7] [1913] 3 K.B. 468.
[8] [1918] A.C. 221.
[9] [1952] A.C. 694.
[10] [1918] A.C. 221.
[11] [1915] 2 K.B. 702.
[12] [1952] 1 K.B. 302.

SLADE J., after stating the grounds of appeal, continued:—I can deal very shortly, first of all, with the second ground of appeal, which is based on what are known as the Judges' Rules. Those rules are designed to secure that no advantage should be taken of a prisoner who is in custody and whom the police have already made up their minds to charge with the commission of an offence, by requiring that in such a case they shall first administer the usual caution before making inquiries of him. The rules have no force in law in the sense of making the answers given by an accused person to any inquiries made in breach of them inadmissible; it is a matter for the discretion of the judge to decide in each case whether, when inquiries are made in contravention of the rules, the answer should be admitted or not. In this particular case Cassels J. took the view that the words "in custody" in the Judges' Rules meant "in custody of the "police" and did not apply to a Broadmoor patient, and he added that if they did, it would never be possible to make any inquiries of a Broadmoor patient without first administering the caution. In the opinion of the court Cassels J. was perfectly right in exercising the discretion that he did in admitting the evidence of the detective inspector, and there is no substance, therefore, in the second ground of appeal.

The first ground raises a much more serious point, but one on which the members of the court have reached a clear conclusion. It is necessary for me to state shortly the facts of the case. [His Lordship referred to the facts and continued:] Cassels J., after hearing legal argument, admitted evidence in regard to the murders alleged to have been committed by the appellant at Bath on the ground that it was material to establish the identity of the murderer of Linda Bowyer, and the question is: Was that evidence properly admitted? The general rule, of course, is to exclude evidence which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment, and it is an irrefragable rule that evidence of such offences shall not be admitted for the purpose of proving that the accused is a person of criminal disposition, or even that he has a propensity for committing the particular type of crime with which he is being charged. But, apart from statute, there are certain recognized exceptions to the general rule under which evidence is admissible of other crimes committed by the accused, in spite of the fact that it tends to prove that he is of a criminal disposition, because it tends to prove that he committed the particular crime with which he is charged. I take the law on this point from the well-known case of *Makin* v. *Attorney-General of New South Wales*,[13] with which Mr. Elam opened his argument. Lord Herschell there said: " It is undoubtedly not competent for the " prosecution to adduce evidence tending to show that the accused " has been guilty of criminal acts other than those covered by the " indictment for the purpose of leading to the conclusion that the " accused is a person likely, from his criminal conduct or " character, to have committed the offence for which he is being " tried. On the other hand, the mere fact that the evidence " adduced tends to show the commission of other crimes does not " render it inadmissible if it be relevant to an issue before the " jury, and it may be so relevant if it bears upon the question " whether the acts charged in the indictment were designed or " accidental, or to rebut a defence which would otherwise be open " to the accused."

Here the evidence was admitted by Cassels J. on the latter ground, namely, that it tended to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder.

In the recent case of *Harris* v. *Director of Public Prosecutions*,[14] in the House of Lords, Lord Simon said: " In my " opinion the principle laid down by Lord Herschell in *Makin's* " case [15] remains the proper principle to apply, and I see no " reason for modifying it." A little later on he said [16]: " It is, " I think, an error to attempt to draw up a closed list of the sort " of cases in which the principle operates; such a list only pro" vides instances of its general application, whereas what really " matters is the principle itself and its proper application to the " particular circumstances of the charge that is being tried. It " is the application that may sometimes be difficult, and the " particular case now before the House illustrates that difficulty." Further on [17] Lord Simon said: " The substance of the matter " appears to me to be that the prosecution may adduce all proper " evidence which tends to prove the charge "; and after dealing with *Thompson* v. *The King* [18] he said: " It is the fact that he " (Thompson) was involved in other occurrences which may " negative the inference of accident or establish his mens rea by " showing ' system.' Or, again, the other occurrences may " sometimes assist to prove his identity, as, for instance, in

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[13] [1894] A.C. 57, 65.
[14] [1952] A.C. 694.
[15] [1894] A.C. 57.
[16] [1952] A.C. 694, 705.
[17] Ibid. 706, 708.
[18] [1918] A.C. 221.

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"*Perkins* v. *Jeffery*.[19] But evidence of other occurrences which "merely tend to deepen suspicion does not go to prove guilt."

That being the law, the question is whether, in this case, the evidence does or does not fall within the category of admissibility as being relevant to prove the crime charged by showing that it was the accused who committed it. The grounds on which the admissibility of the evidence was urged by the Solicitor-General in the court below was the similarity of the circumstances surrounding the murders in the case of the two Bath murders on the one hand and the Farley Village murder on the other. He stated the similarities to be, firstly, that each of the victims was a young girl; secondly, that each was killed by manual strangulation; thirdly, that in none of the cases was there any attempt at sexual interference or any apparent motive for the crime; fourthly, that in no case was there any evidence of a struggle; and fifthly, that in none of the three cases was any attempt made to conceal the body, though that could easily have been done.

Those similarities were fortified by the evidence of the doctor who examined the bodies of the two girls murdered at Bath and by the pathologist called in the case of Linda Bowyer, who had studied the depositions, the photographs and the post-mortem reports in the two cases at Bath. The evidence with regard to the Bath murders was tendered and admitted for the purpose of showing that the same person killed all three little girls; that is to say, that the person who strangled Brenda Goddard and Cicely Batstone, in the circumstances described, also manually strangled Linda Bowyer in similar circumstances as regards the method of death, the precision of the strangulation, and the other similar circumstances to which I have referred. In the opinion of the court that evidence was rightly admitted, not for the purpose of showing, to use Mr. Elam's words, that the appellant was "a "professional strangler," but to show that he strangled Linda Bowyer; in other words, for the purpose of identifying the murderer of Linda Bowyer as being the same individual as the person who had murdered the other two little girls in precisely the same way.

I can see no distinction in principle between the present case and *Thompson* v. *The King*,[20] to which we were referred, and, indeed, I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. In *Thompson's* case [20] evidence was admitted to prove his identity which showed that he was a person who suffered from the abnormal propensity of homosexuality. It is an abnormal propensity to strangle young girls and to do so without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where, presumably, their deaths would be detected. In the judgment of the court, that evidence was admissible because it tended to identify the person who murdered Linda Bowyer with the person who confessed in his statements to having murdered the other two girls a year before, in exactly similar circumstances.

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[19] [1915] 2 K.B. 702.

[20] [1918] A.C. 221.

Mr. Elam asked: "How far does the admissibility of such "evidence go? Would it extend to the case of a burglar, house-"breaker, thief, and so on?" Speaking for myself, I think that if the question of identity arose in a case of housebreaking and it were possible to adduce evidence that there was some hall mark or other peculiarity in relation to earlier housebreakings which were also apparent in the case of the housebreaking charged, so as to stamp the accused man, not only with the housebreaking charged but with the earlier housebreakings, and there was a confession or other evidence that he had committed the earlier housebreakings, that would fall within the same principle of admissibility, not to prove his propensity for housebreaking, but to prove that he was the person who had committed the housebreaking charged.

I should repeat, perhaps, as I stated at the beginning of this judgment, that the sole ground of his appeal is the admissibility of the evidence as a matter of law. It is unnecessary, therefore, to consider whether, when evidence is admissible, its prejudicial effect is so disproportionate to its probative value that the judge, in the exercise of his discretion, ought not to have allowed its admission. That point does not arise in this appeal since Mr. Elam very properly said that if the evidence was admissible, he conceded that the discretion of the judge at the trial was judicially exercised. In the circumstances this appeal is dismissed.

Appeal dismissed.

Solicitors: *The Registrar of the Court of Criminal Appeal; The Director of Public Prosecutions.*

P. B. D.

1952
July 29, 30.

Lloyd-Jacob J.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* QUEEN'S PARK RANGERS FOOTBALL AND ATHLETIC CLUB LD.

[1951. C. 4840.]

Revenue—Entertainments tax—Lump sum—Booklet of tickets—Whether payment for admission by means of lump sum—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1 (4).

A football club issued booklets containing a number of transferable and individually numbered tickets admitting the holders to reserved seats at a price (inclusive of tax) which was shown on each ticket. The price charged for booklets admitting persons to the centre stand was £6 6s. 0d. and for those admitting persons to the wing stands was £4 16s. 3d. The prices printed on the tickets, in each booklet, which were less than the prices of admission otherwise payable, when added up amounted to £6 6s. 0d. and £4 16s. 3d. respectively.

The Commissioners of Customs and Excise commenced an action against the club, claiming £857 for entertainments duty, on the basis that the system of charging entrance fees by means of the issue of these booklets came within the provisions of section 1 (4) of the Finance (New Duties) Act, 1916, under the description of a "lump "sum." The club contended that, on a proper computation, the sum due was £520:—

Held, that the word "lump" in section 1 (4) of the Act of 1916 was used in contradistinction to the word "aggregate" and applied to cases where the creation of the total sum could not directly be referred to both the number of individual items to be included in the whole and the individual values at which each such item must be assessed; that the prices charged for the booklets were not lump sums within the terms of the subsection; and that the action failed.

ACTION, tried by Lloyd-Jacob J., sitting as an additional judge of the Queen's Bench Division.

The Queen's Park Rangers Football and Athletic Club Ld. issued booklets covering a whole season for the centre stand of their ground which contained 21 tickets marked 3s. 6d., inclusive of tax, for Football League games, and 35 tickets marked 2s. 6d., inclusive of tax for other games. They also issued similar booklets at 2s. 6d., inclusive of tax, and 1s. 3d., inclusive of tax, respectively, for admission to the wing stands. The prices printed on the tickets, which were less than the prices of admission otherwise payable, when added amounted to £6 6s. 0d. and £4 16s. 3d., the respective cost of each of the booklets.

The Commissioners of Customs and Excise brought an action against the club claiming £857 duty, on the basis that the system of charging entrance fees by means of the booklets came within the provisions of section 1 (4) of the Finance (New Duties) Act, 1916[1] under the description of a lump sum. The club contended that the amount due was £520.

B. J. M. MacKenna Q.C. and *J. P. Ashworth* for the Commissioners. It is clear from section 1 (4) of the Act of 1916 that the duty is payable on a lump sum. This is a lump sum payment for the right of admission to the ground, the price being £6 6s. 0d., which is the sum payable for the right of admission to all the matches specified in the books. The only payment received is a lump sum payment for the right of admission. If the facts are examined, it will be seen that there is no difference between providing a book containing 21 tickets at 3s. 6d. each and 35 tickets at 1s. 6d. each and making a comprehensive charge of £6 6s. 0d. for all the matches.

The transaction constitutes a contract made at an earlier stage than that at which the tickets are sent. It is made when the money is sent to retain the right. The book of tickets comes later, in performance of the company's obligation.

There appears to be no authority on this question.

J. Millard Tucker Q.C. and *John Clements* for the club. This system of payment does not come within the provisions of section 1 (4) of the Act of 1916, and is not a lump sum payment. The words "lump sum" must be given their ordinary and natural meaning. Since, on the facts as established in evidence, an individual could buy a number of tickets, the cost of which totalled £6 6s. 0d., the sum paid was not a lump sum. If the club had sold a number of tickets at a reduced price, which had no reference to the total value of the tickets sold, different considerations might have arisen. The word "lump" is used in the Act of 1916 in contradistinction to the word "aggregate." The latter word is a correct description of the sum which was paid in this case, namely, the total cost of a number of tickets at 3s. 6d. inclusive of tax and 2s. 6d. inclusive of tax, in the case of one booklet, and 2s. 6d. inclusive of tax and 1s. 3d. inclusive of tax, in the case of the other booklet.

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[1] Finance (New Duties) Act, 1916, s. 1 (4): "Where the payment for "admission to an entertainment is "made by means of a lump sum paid "as a subscription or contribution to "any club, association, or society, or "for a season ticket or for the right "of admission to a series of enter-"tainments, or to any entertainment "during a certain period of time, the "entertainments duty shall be paid "on the amount of the lump sum. ". . ."

The club does not succeed in disposing of all the numbered and reserved seats in the stands by means of the booklets, and a higher charge is made to chance applicants for seats than that which is made for tickets contained in the booklets.

MacKenna Q.C. replied.

LLOYD-JACOB J. By the Finance (New Duties) Act of 1916, s. 1 (1), a duty chargeable on all payments for admission to any entertainment was prescribed, the scale of charges at present in operation being those contained in Sch. VII to the Finance Act, 1948. The plaintiffs contend that liability for duty in respect of the books of tickets falls to be determined under subsection (4) of this section, the relevant words of which are: " Where the payment for admission to an entertainment is made by means of a " lump sum paid . . . for the right of admission to a series of " entertainments . . . the entertainment duty shall be paid on " the amount of the lump sum."

There is no question that the books of tickets relate to a series of occurrences which are entertainments within the definition contained in section 1 (6), and the question to be determined involves a consideration of the words " a lump sum."

The circumstances are as follows: [His Lordship stated the nature of the various fixtures arranged for the football season 1950–51 and continued] The evidence further establishes that it is an advantage to the defendants to secure payment in advance for their stand accommodation if that is found to be possible, for it not only augments their funds during the close season, but it provides an assurance of support during the playing season.

The board determined to issue books of tickets which would ensure a reserved and allocated seat to the holder, and they caused to be distributed to potential subscribers application forms for books A and B respectively.

[His Lordship summarized the contents of the application forms and of the booklets and continued:]

It appears that the defendants do not succeed in disposing of all the numbered and reserved seats in these stands to advance applicants who subscribe for books of tickets, and they accordingly offer, to the limit of the accommodation available, the right to occupy unsold stand seats to chance comers on payment of 5s. 0d. and 3s. 6d. respectively for centre and wing stand seats when

Football League matches are being played, 2s. 6d. and 2s. 0d. respectively when Football Combination matches are being played, and 1s. 6d. and 1s. 0d. respectively when mid-week matches are being played; and it is argued that these sums identify the ascertained amounts at which admission to the entertainment is in fact charged.

The first question concerns the construction of the words in section 1 (4) of the Finance (New Duties) Act, 1916, namely, "Where the payment . . . is made by means of a lump sum." In this connexion the word "sum" itself appears to have two connotations, that of an aggregate of currency tokens, for example, so many pounds and so many shillings, and that of an addition of individual amounts to create a sum, for example, one guinea plus four half-guineas plus eight crowns, and so on. The first connotation must always be present in respect of a money payment, so that, prima facie, the word "lump" in relation to the sum must define or qualify the second connotation. In my judgment it is used in contradistinction to the word "aggregate," and it applies to cases where the creation of the total sum cannot directly be referred to both the number of individual items to be included in the whole and the individual values at which each such item must be assessed. Both of these features, that is to say, the number of items and the value of each item, may be features in the estimation of the lump sum. Unless the sum can be directly equated in terms of number and individual value so as to become an aggregate sum, it is in my judgment a lump sum.

Now, are the sums of £6 6s. 0d. and £4 16s. 3d. here in question "lump sums" as so construed? There is no reason to question the reliability of the evidence that the board of directors met and determined the separate prices at which reserved seats in the stands would be offered to persons prepared to purchase tickets for all home games, and it is beside the point that they decided on different prices for purchasers who were not content to patronize the full programme of matches. Moreover, the variation in totals which a different number of games in the following season imposed on the subscribers supports this statement. In my judgment, the circumstances established in evidence do not bring the case within the terms of subsection (4) of section 1 of the Act of 1916. It, therefore, becomes unnecessary to consider either the regulations contained in the Entertainment Duty Regulations of 1921, or the effect of section 3 of the Finance Act of 1944. So far as concerns the regulations it is

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sufficient only to say this, that I did not find it necessary to refer to them for the purpose of my construction of the Finance (New Duties) Act, 1916, but having regard to Mr. Tucker's argument it is perhaps right that I should say that I find his submission under the regulations consistent with the construction that I have been constrained to adopt.

So far as concerns the Finance Act, 1944, a variation in the amount of duty payable was provided in respect of certain cases of lump sum payments. For the benefit of any future court which may have to consider the matters raised by the present case, I desire to say only this, that section 3 (*b*) requires that it shall be established that the person making the payment could have obtained the same rights of admission by making a number of separate payments of ascertained amounts. I should not be prepared to hold that the rights of admission secured by the delivery of a book of numbered and reserved tickets before the opening of the football season could be said to be equivalent to the right to apply for an individual ticket on each separate occasion of a match, if for no other reason, because, in the latter event, no ticket may in fact be available for some of the more popular contests. As I see the matter, the only way in which equivalent rights of admission could have been secured would be for the applicant, at a suitable time before the opening of the season, to have attended on the defendants and asked for the individual tickets comprised in the appropriate book, and tendered payment for each. The evidence in fact establishes that such an applicant would have been granted the tickets, and I cannot regard the addition of a pair of board covers secured by two metal staples to the totality of such tickets as creating any difference in that which is supplied.

The action, therefore, in so far as its purpose was to establish liability under subsection (4) of section 1 of the 1916 Act, or section 3 of the Finance Act, 1944, fails, but, as on the pleadings, the defendants admit a liability at the date of the issue of the writ for the sum of £520 7s. 10d., I will accede to the request of counsel for the plaintiffs and enter judgment for the plaintiffs for £520 7s. 10d.; but I will direct that the costs of the proceedings must be paid by the plaintiffs to the defendants.

Judgment accordingly.

Solicitors: *Solicitor, Customs & Excise; Evan Davies & Co.*

J. L. D.

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Oct. 8, 14.

Lord Goddard C.J., Finnemore and McNair JJ.

Road Traffic—Excise penalty for using unlicensed vehicle—Offence committed in last quarter of year—Penalty expressed to be "three "times the amount of the duty chargeable"—Meaning—Annual and not quarterly rate intended—Onus on defendant to prove duty paid for part of year—Vehicles (Excise) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 89), *ss.* 1 (*b*), 11 *and* 15 (1).

By section 15 (1) of the Vehicles (Excise) Act, 1949: "If any person uses on a public road any mechanically propelled vehicle for which a licence under this Act is not in force . . . he shall be liable to whichever is the greater of the following penalties, namely—(*a*) an excise penalty of £20; or (*b*) an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle. . . ."

Held, that "the duty chargeable" is the duty chargeable for the whole year; that, accordingly, a defendant found using an unlicensed motor vehicle is prima facie liable to an excise penalty calculated by reference to the annual duty; but that a defendant may show that part of the annual duty has been paid, whereupon the penalty may be calculated by reference to that part only of the annual duty which remains outstanding.

CASE STATED by Surrey justices sitting at Caterham.

An information was preferred by the prosecutor against the defendant, Dudley Thomas Perry, alleging that on December 16, 1951, he unlawfully used on a public road a motor-vehicle for which a licence was not in force, contrary to section 15 (1) of the Vehicles (Excise) Act, 1949.[1] The defendant, who had previously been convicted of a similar offence, pleaded guilty and made no defence.

At the hearing of the information the following facts were proved or admitted:—The defendant's vehicle was used on the highway on December 16, 1951. No evidence was given that it was used on any other day in 1951. The annual duty in respect

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[1] Vehicles (Excise) Act, 1949, s. 15 (1): "If any person uses on a public "road any mechanically propelled "vehicle for which a licence under "this Act is not in force . . . he shall "be liable to whichever is the greater "of the following penalties, namely "—(*a*) an excise penalty of twenty "pounds; or (*b*) an excise penalty "equal to three times the amount of "the duty chargeable in respect of "the vehicle. . . ."

S. 1: "Subject to the provisions of "this Act—(*a*) there shall be charged "in respect of mechanically propelled "vehicles used on public roads . . . "the duties of excise provided by the "next five following sections of this "Act; and (*b*) the duty so chargeable ". . . shall be paid annually upon a "licence to be taken out by the person "keeping the vehicle."

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of the vehicle assessed in accordance with the Vehicles (Excise) Act, 1949, was £30.

It was contended on behalf of the prosecutor that the penalty for an offence under section 15 (1) of the Vehicles (Excise) Act, 1949, was either an excise penalty of £20 or an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle, whichever sum was the greater; that by virtue of section 1 (*b*) of that Act the duty chargeable on a mechanically propelled vehicle should be paid annually upon a licence to be taken out by the person keeping the vehicle; that section 78 of the Excise Management Act, 1827, gave justices power to mitigate any penalty incurred for any offence against that Act or against any other Acts relating to the revenue of excise, but that such mitigation should not (except in case of a first offence) reduce such penalty to less than one-fourth part thereof; and that for the purposes of section 15 (1) of the Act of 1949 the duty chargeable on the defendant's vehicle was the annual duty, namely, £30, with the result that the maximum penalty which the justices could impose was £90 and the minimum £22 10s., being one-quarter of the maximum penalty.

The justices considered that the reference in section 1 (*b*) of the Vehicles (Excise) Act, 1949, to " the duty so chargeable " corresponded with the expression " the full annual duty chargeable " which appeared in section 11 (2) of the Act, and that the words " duty chargeable " as used in section 15 (1) of the Act had reference to the duty chargeable in fact to the particular vehicle and not to the full annual duty that would have been chargeable if the vehicle had been taxed for a full year; that in fact the duty chargeable in respect of the defendant's vehicle on December 16, 1951, was the amount appropriate to the last quarter of the year and there was no legal power to claim that duty should be paid by the defendant for the three quarters of the year which fell before the quarter within which the offence was committed.

They accordingly decided that the maximum penalty which they could impose by virtue of section 15 (1) of the Act of 1949 was £24 15s., being three times the amount of duty chargeable on the vehicle for the last quarter of the year; and in exercise of their powers under section 78 of the Excise Management Act, 1827, they reduced that maximum penalty to £12.

The prosecutor appealed.

J. P. Ashworth for the appellant prosecutor. The appropriate excise penalty for the use of an unlicensed vehicle on a road should be based on the annual duty chargeable, and not on a quarterly or other rate. Section 15 (1) of the Vehicles (Excise) Act, 1949, provides that the penalty for the use of an unlicensed vehicle shall be £20 or three times the amount of the "duty "chargeable" on the vehicle, whichever is the greater. Section 1 (*b*) states that the "duty chargeable" on a mechanically propelled vehicle shall be "paid annually"; although by virtue of section 11 and the statutory instrument made thereunder, a licence may be taken out for various periods of less than a year. The words "the duty chargeable" in section 15 (1) of the Act of 1949 must be construed as meaning the annual duty which is referred to in section 1. If they are not so construed, the difficulty arises that whenever a person is found driving an unlicensed vehicle on a particular day the prosecution have no means of knowing for how long the vehicle has in fact been used without a licence. It is submitted that, unless the owner of a vehicle has taken advantage of section 11 of the Act of 1949 and licensed his vehicle for some period less than a year, justices must presume that he would have licensed it for the year and impose a penalty based on the amount of the annual duty. The duty chargeable is prima facie an annual one and the onus is upon a defendant to show that in his case the penalty should be calculated on some other rate of duty, e.g., because he has already paid duty for part of the year.

The defendant did not appear and was not represented.

Cur. adv. vult.

Oct. 14. LORD GODDARD C.J. This is a special case stated by justices for the county of Surrey, before whom the defendant was charged with unlawfully using on a public road a certain motor-vehicle for which a licence was not in force, contrary to section 15 (1) of the Vehicles (Excise) Act, 1949. The defendant pleaded guilty and admitted a previous conviction for a similar offence by him, and the justices imposed a penalty of £12. The question that arises is whether the justices had any power to impose a penalty of less than £22 10s. in the circumstances which hereafter appear. The vehicle was in fact a goods vehicle and the annual duty imposed by the Act was £30. By section 15 of the Act a person using an unlicensed vehicle on a public road is liable to (*a*) an excise penalty of £20, or (*b*) an excise penalty

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equal to three times the amount of the duty chargeable in respect of the vehicle, whichever is the greater. As this was a second offence the justices had no power to mitigate the fine under section 4 of the Summary Jurisdiction Act, 1879, but by section 78 of the Excise Management Act, 1827, they have a general power to mitigate provided they do not reduce the penalty to less than a quarter. It was contended for the prosecution that the maximum penalty was £90 and, therefore, that the least fine that could be imposed was one of £22 10s.

The question which we have to decide is what is the meaning of the words in section 15 (1), "the amount of the duty chargeable in respect of the vehicle," and this involves a consideration of two or three sections in the Act. By section 1: "Subject to "the provisions of this Act—(*a*) there shall be charged in respect "of mechanically propelled vehicles used on public roads . . . "the duties of excise provided by the next five following sections ". . . ; and (*b*) the duty so chargeable . . . shall be paid annually "upon a licence to be taken out by the person keeping the "vehicle." Section 5, which concerns goods vehicles, provides that the duty chargeable in respect of a goods vehicle shall be that set out in Sch. IV to the Act, and the duties therein set out are all annual duties. By section 11 it is provided that notwithstanding anything in section 1 (*b*) a licence may be taken out for such periods of the year and on payment of duty at such rates as the Minister may by order made by statutory instrument prescribe. It is enough to say that a licence may be taken out for any period of the year beginning before October 1 and expiring on December 31, for any quarterly period or for any period less than a quarterly period expiring on the last day of any quarterly period, and the provisions are such that if a licence is taken out to be current only during the last month of a quarter a proportion only of the quarterly payment will be required.

The evidence in this case showed that the vehicle was used on December 16, and no evidence was given that it was used on any other day in that year, and accordingly the justices were of opinion that the maximum penalty was three times the amount of duty chargeable in respect of the particular vehicle for the last quarter of the year. In fact, if the view which they took of the section is right, it would have been rather less, as if they were entitled to consider that this vehicle was only used in the month of December the duty chargeable would have been, had it been licensed for that month only, less than if it had been licensed for the whole quarter. No evidence was given by the defendant, so the only evidence before the justices was that the vehicle was being used on one day and had no licence.

In our opinion the words "the amount of the duty chargeable "in respect of the vehicle" in section 15 must prima facie apply to the duty charged by section 1 of the Act and must also refer to the duty chargeable as specified in Sch. IV as provided by section 5. If, therefore, a person is found driving a vehicle which is unlicensed, prima facie he is liable to a penalty of three times the annual excise duty; but if he has taken advantage of section 11 and taken out a licence for part of the year and paid the duty for a part of the year, it would follow that the duty chargeable in respect of the vehicle would only be so much of the annual duty as had not already been paid. Thus if a man takes out a licence for his car for the first two quarters of a year and uses it during the second half of that year without taking out a further licence he could, in our opinion, show that the amount of the duty chargeable was only the annual sum less the amount already paid by him. It is true that this would require him to give evidence that he had paid duty and not require the excise authorities as prosecutors to prove what the duty owing was, but it is possible in a criminal case as in a civil case for the onus to shift. He is found using an unlicensed car. He is therefore liable to a penalty equal to three times the amount of the duty chargeable. The duty chargeable in the Act is a duty for the whole year. If, therefore, he has paid duty for part of the year it is for him to show it. As the defendant in this case gave no evidence, we think that he was liable to pay the penalty of three times the amount of the full duty, that is to say £90, and, therefore, the justices were bound to impose a penalty of at least a quarter of that sum, namely, £22 10s.

It is abundantly clear that there is neither hardship nor injustice in this result, as if the defendant had paid duty during the previous part of the year he would, no doubt, have given evidence to that effect. The result at which we have arrived will also apply in the case of a car acquired by a purchaser during a year. If, for instance, during the year he bought a car which had no licence and used it, when prosecuted he could show the date when he acquired the car and the court would then be able to find by reference to section 11 and the statutory instrument what the duty payable on the car would have been had it been licensed. It would not, in our opinion, be open to a defendant in such circumstances to claim that if he had taken out a licence for it the licence would only have been for a short period, such as a quarter. If he had not taken advantage of the provisions of section 11, his intention to do so, even if the justices thought it was a genuine intention, would not avail him. What we decide is that the penalty imposed by section 15 is prima facie to be calculated by reference to the annual duty but that it is open in any case to a defendant to show that in fact part of that annual duty has been paid so that only a portion of the duty remains chargeable.

The case must go back to the justices with an intimation that they must impose a penalty of not less than £22 10s. While we are differing from them we fully appreciate the reasons for their decision and recognize the clarity with which this case is stated.

FINNEMORE J. I agree.

MCNAIR J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *The Treasury Solicitor.*

S. C.

END OF VOL. II AND OF QUEEN'S BENCH SERIES FOR 1952.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1952, will be as follows:—

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2. —— *Trading with the enemy—Custodian of Enemy Property—Meaning of "enemy"—Involuntary residence in enemy territory—Order vesting property in custodian—Whether power of sale excluded—Trading with the Enemy Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 2, 7.
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FACTORY—*Dermatitis from Monsonia wood dust—No precautions taken—No breach of statutory duty—"Provisions . . . for . . . "adequate ventilation . . . and for rendering "harmless . . . dust . . . that may be "injurious to health"—Not applicable to protective gloves, etc.—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 4, 47.
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2. ——*Electricity generating station—Part operating, part in possession of construction contractors—Accident to contractors' employee—Liability—"Place situate within "close, curtilage or precincts forming a fac-"tory . . . used for . . . purposes other than "processes carried on in . . . factory"—Not part of factory—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (6).
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3. —— *Master and servant—Floor—Maintenance—Flooding of factory floors by exceptional rainfall—Gangway slippery with mixture of water and escaped oil—Workman allowed to work there—No negligence—No breach of duty to maintain gangway—Meaning of "maintain"—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (1).
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4. —— *Personal injuries—Horizontal milling machine—Statutory duty of occupiers—Breach—Horizontal Milling Machine Regulations*, 1928 (*S.R. & O. No.* 548, *as amended by* 1934, *No.* 207), *reg.* 3—*Factory and Workshops Act*, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 79—*Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14.
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5. —— *Statutory duty—Duty of workman to use safety appliance—Dangerous machinery—Fencing—Provision of safety guard by employer—Omission of workman to use guard—Breach of statutory duty by workman—Contributory negligence—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16, 119.
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HUSBAND AND WIFE—*Maintenance—Desertion by wife—Wife in receipt of assistance (under National Assistance Act*, 1948)—*No liability of husband under National Assistance Act*, 1948, *to maintain wife—National Assistance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43.
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2. —— *Maintenance order—Husband living with wife in her house—Wife's leave and licence for him to do so—Separate domestic arrangements—"Resides with"—Order of no effect—Summary Jurisdiction (Separation and Maintenance) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1 (4).
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3. —— *Maintenance order—Spouses both resident in same house—Husband's subsequent absence from and return to residence—No resumption of cohabitation—Order enforceable—Summary Jurisdiction (Separation and Maintenance) Act*, 1925 (15 *&* 16 *Geo.* 6, *c.* 51), *ss.* 1 (4), 2 (2).
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4. —— *Matrimonial home possessed by husband—Right of wife to reside therein—Husband restrained from selling house until provision of alternative accommodation—Jurisdiction of county court judge—Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.
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5. —— Matrimonial home. *See* BANKRUPTCY.

6. —— *Principal and agent—Necessaries—Separation due to husband's cruelty—Maintenance—Money paid to wife by third party for necessaries—Whether husband liable to third party—Wife's financial resources.*
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2. —— *Breach of covenant to repair — Landlord's claim for dilapidations—Repairs paid for by succeeding tenant—Diminution in value of reversion—Tenant's liability—Sufficient that work had to be executed—Landlord and Tenant Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18.
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5. —— *Rent restriction—Increase of rent—Improvement or structural alteration—Concrete foundations of house raised—Whether a "repair"—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*), (5)—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch.*
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6. —— *Rent restriction—Possession—Camp site let with bungalow—"Land or premises "let together with a dwelling-house"—Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).
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7. —— *Rent restriction—Possession—Non-occupying tenant—Deserting husband—Wife remaining in occupation and paying rent—Alleged matrimonial offence by wife—No action by husband to revoke wife's licence to remain in occupation—Landlord not entitled to possession.*
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8. —— *Rent restriction — Possession of dwelling-house—Unconditional order made in favour of landlord—Greater hardship—Death of landlord before order became effective—Claim to possession by daughter as beneficiary under landlord's will—Whether order continued to be effective—Change of circumstances—County Court Rules*, 1936, *Ord.* 25, *r.* 6.
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11. —— *Rent tribunal—Security of tenure—Notice to quit given by landlord more than three months after decision of tribunal—Jurisdiction of tribunal to grant or extend security of tenure—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 11 (1).
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12. —— *Shop — Tenancy — Application for renewal of term—Reasonable rent—Whether market rent — Greater hardship — Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *ss.* 10, 12.
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13. —— *Tenancy of shop and living accommodation—Shop carried on by company and tenant managing director — Shares held by tenant and his wife, relations and friends—Expiring tenancy—Application by tenant for new tenancy—Refusal on ground tenant not "occupier of shop"—Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 10 (1) *and* (2), *s.* 12 (3) (*b*) *and s.* 20 (1).
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2. —— *Negligence—Services of workman hired out by employer—Workman injured by negligence of hirer—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145)—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151.
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3. —— *Indemnity and contribution—Master and servant—Negligence of servant—Whether liable to indemnify master—Doctor employed by hospital board—Negligence of doctor—Death of patient—Insufficient experience of doctor.*
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POISONS — *Sale of poisons — Self-service system—Selection of articles by customer from shelves—Payment in presence of qualified pharmacist—Pharmacy and Poisons Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 25), *s.* 18 (1) (*a*) (*iii*). *Contract—Offer and acceptance—Sale of goods—Self-service—Time of sale.*
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2. —— *Open space—Rateable occupation—Land conveyed to local authority as open space—Used by sports clubs—Exclusion of public for short periods—Payment occasionally required for admission—Occupation by public—Whether local authority in beneficial occupation—Open Spaces Act*, 1906 (6 *Edw.* 7, *c.* 25), *ss.* 10, 15.
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2. —— *Income Tax—Sale of houses—Advances by building society to purchasers—Advances in excess of usual amount—Deposits by vendor company as collateral securities—Time when deposits to be taken into account for income tax purposes—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*
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ROAD TRAFFIC—*Driving without due care and attention — Collision — Justices' finding that defendant committed an error of judgment—Question of fact whether driving without due care and attention—What caused him to do so, irrelevant—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 12.
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2. —— *Excise penalty for using unlicensed vehicle—Offence committed in last quarter of year—Penalty expressed to be " three times " the amount of the duty chargeable "—Meaning—Annual and not quarterly rate intended—Onus on defendant to prove duty paid for part of year—Vehicles* (*Excise*) *Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 89), *ss.* 1 (*b*), 11 *and* 15 (1).
Holland *v.* Perry - - **Divl.Ct. 923**

3. —— *Motor car—Shooting brake—Goods vehicle licensed under " C " licence—Vehicle " authorised to be used under a licence " granted under Part I of the Road and Rail " Traffic Act*, 1933 "—*Vehicle used solely for the carriage of passengers—Speed limit—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 10, *Sch. I—Road Traffic Act*, 1934 (24 & 25 *Geo.* 5, *c.* 50), *Sch. I—Road and Rail Traffic Act*, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 8, 9—*Motor Vehicles* (*Variation of Speed Limit*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1705), *r.* 2.
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3. ——. *See* Contract; Poisons.

SHIPPING — *Limitation of liability — Fatal accident to member of crew—Negligence—Safe system of work—" Actual fault or privity "—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.
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TORT—*Separate tortfeasors—Contribution—Wife a passenger when husband driving vehicle — Collision with car driven by defendant—Husband and defendant both to blame—Wife awarded damages against defendant for negligence—Counterclaim by defendant against husband for proportion of that financial loss—Whether cause of action under Law Reform* (*Contributory Negligence*) *Act*, 1945 (8 & 9 *Geo.* 6. *c.* 28), *s.* 1 (1)—*What is "damage" under that subsection?*
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TOWN AND COUNTRY PLANNING—*Compulsory acquisition of land—Notice to treat—Premises used as a Unitarian church and centre—War damage—Part of premises at date of notice let to business firm—intention to reinstate in another place—Land " devoted " to a purpose of such a nature that there is " no general demand or market for land for " that purpose "—Basis of assessment of compensation—Acquisition of Land* (*Assessment of Compensation*) *Act*, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *r.* (5)—*Town and Country Planning Act*, 1944 (7 & 8 *Geo.* 6, *c.* 47), *ss.* 57 *and* 58.
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2. —— *Compulsory purchase order — Owner's refusal to sell land at existing use value to purchaser with planning permission to develop — Planning permission obtained without owner's consent or knowledge—Persons entitled to apply for planning permission—Notice to owner of application for planning permission unnecessary — Second purchaser willing to pay price in excess of existing use value—Compulsory purchase by Central Land Board—Planning permission and compulsory purchase order valid—Acquisition of Land* (*Authorisation Procedure*) *Act*, 1946 (9 & 10 *Geo.* 6, *c.* 49), *Sch.* 1, *para.* 15—*Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 43.
Hanily *v.* Minister of Local Government and Planning - - - **Parker J. 444**

3. —— *Enforcement notice under town planning scheme—Notice not stating period at expiration of which it came into effect—No opportunity given for appealing against demolition order—Invalidity of notice—Town and Country Planning Act*, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23 (2) (3).
Burgess *v.* Jarvis and Sevenoaks Rural District Council - - - - **C.A. 41**

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Buckingham County Council *v.* Callingham - - - - - - - **C.A. 515**

TRADE UNION—*Contractual force of rules*—*Expulsion of member*—*Rules of union*—*Jurisdiction of court*—*Right to work.*
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